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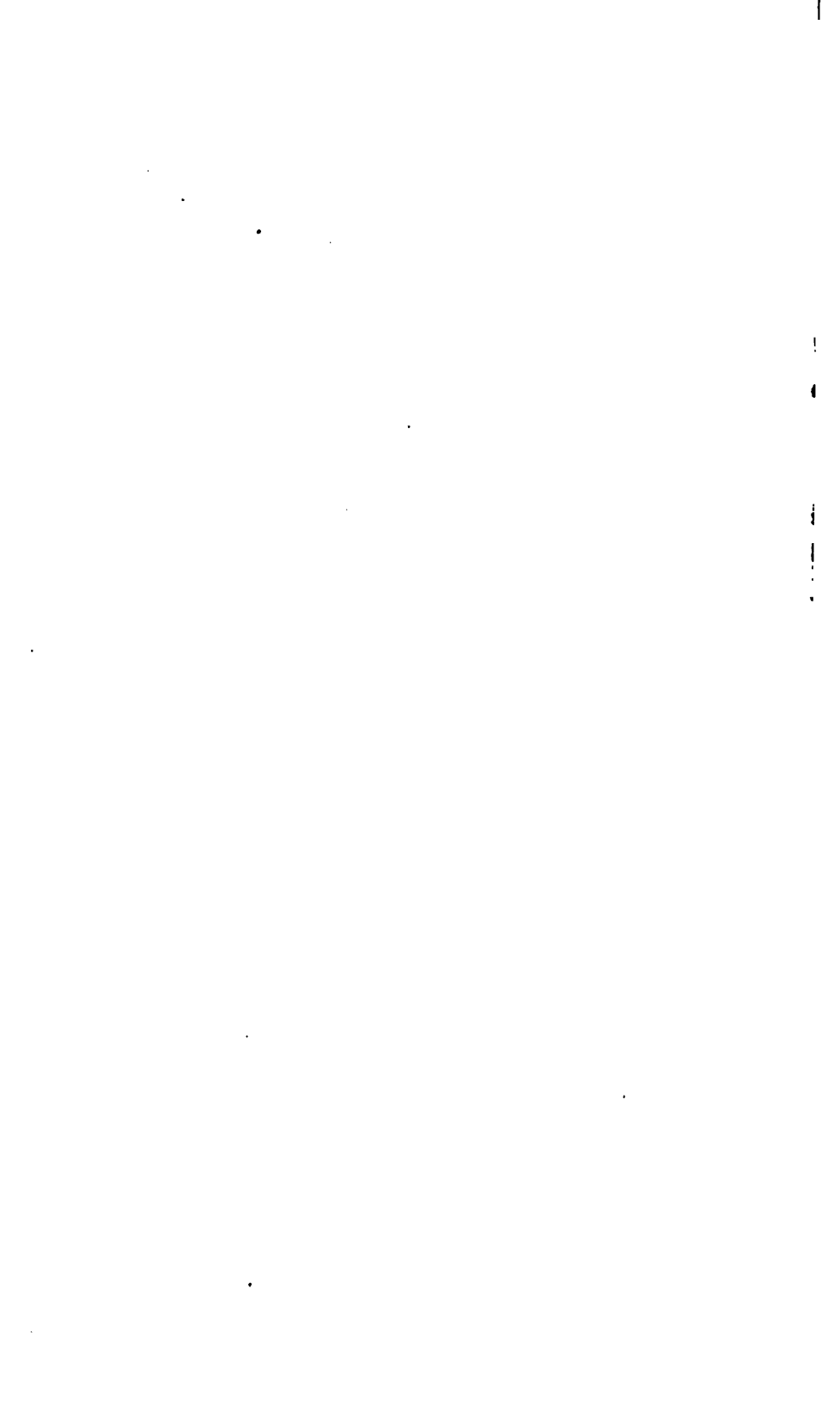


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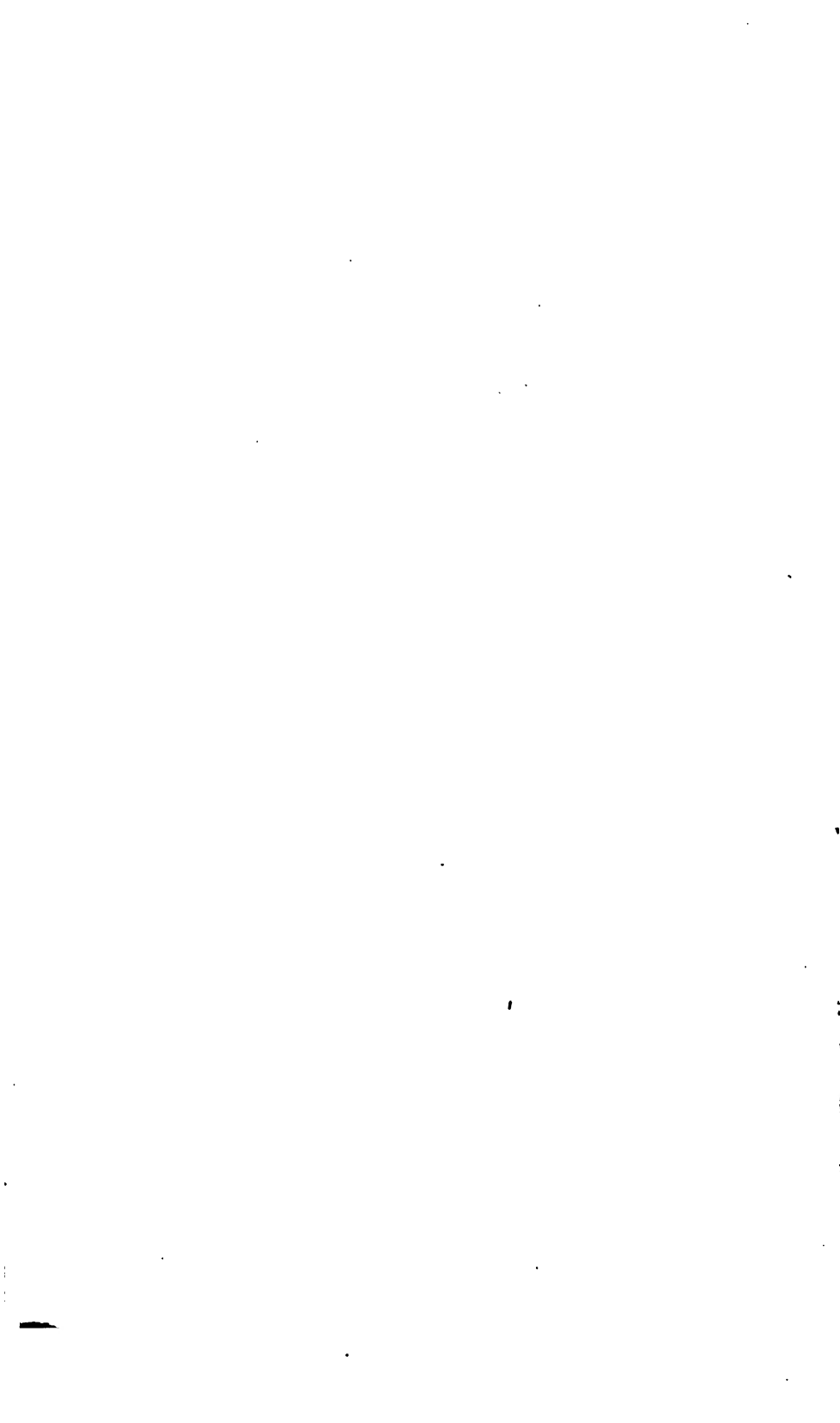
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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA


C. P. POMEROY,
REPORTER.

VOLUME 127
WITH
NOTES ON CAL. REPORTS.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article 6, section 2.]

§ 2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, dominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either be-

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fore or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1899, page 11.]

SECTION 1. The Supreme Court of the State of California shall immediately upon the expiration of the term of office of the present Supreme Court Commissioners appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of two years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States, and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[Sac. No. 473. Department One.—November 18, 1899.]

**PACIFIC PAVING COMPANY, Respondent, v. J. L.
MOWBRAY, Appellant.**

STREET IMPROVEMENT—JURISDICTION OF CITY COUNCIL—PROTEST OF OWNERS OF FRONTAGE—ASSESSMENT—FINDING—REVIEW UPON APPEAL.—Upon appeal from a judgment enforcing an assessment for a street improvement, where the jurisdiction of the city council to order the improvement is assailed, upon the ground that the owners of a majority of the frontage had protested against it, if the record is silent as to the amount of the entire frontage, the finding of the superior court against the sufficiency of such protest cannot be disturbed; and it is immaterial to consider whether erasures upon the protest were properly made.

ID.—ERROR NOT TO BE PRESUMED—DUTY OF APPELLANT.—Error is not to be presumed, but must in all cases be made to appear affirmatively before the appellant is entitled to a reversal; and, if the appellant seeks to have a finding set aside, it is incumbent upon him to show upon the record that it was contrary to the evidence.

ID.—REGULARITY OF ASSESSMENT—PRIMA FACIE EVIDENCE—INSUFFICIENT PROTEST.—The assessment and other documents connected therewith are made by the statute *prima facie* evidence of its regularity and correctness, and of the prior proceedings and acts of the city council, and such *prima facie* evidence is not overcome by evidence of a protest not proved to have been signed by the owners of a majority of the frontage.

ID.—PROTEST NOT PURPORTING TO BE PROPERLY SIGNED—ACTION OF COUNCIL UNNECESSARY.—Where the protest did not "purport" to be signed by the owners of a majority of the frontage, it was not necessary that the city council should determine or enter of record its judgment that it had not been so legally signed.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion of the court.

F. H. Gould, and Budd & Thompson, for Appellant.

James A Louttit, and Louttit & Middlecoff, for Respondent.

HARRISON, J.—Action upon a street assessment. The city council of Stockton ordered certain improvements to be made upon Market street in that city from the west line of Hunter street to the west line of American street, and awarded the contract therefor to the plaintiff. After its completion to the satisfaction of the superintendent of streets, that officer issued to it an assessment for the cost of the work, together with a warrant for its collection, and after demand therefor plaintiff brought the present action to foreclose the lien of its assessment upon certain property belonging to the defendant. Judgment was rendered in its favor, from which and an order denying a new trial the defendant has appealed.

The plaintiff's right of action was contested by the defendant upon the ground that the city council had no jurisdiction to order the improvement, for the reason that the owners of a majority of the frontage of the property on the line of the proposed improvement filed a protest against the same within ten days after the expiration of the publication of the notice of intention. Upon this issue the court found against the allegation of his answer, and this finding is attacked as not supported by the evidence.

In support of his averment the defendant introduced a document, which had been filed within said ten days with the city clerk, purporting to be a protest against the improvement from certain owners of property along the line thereof. This document appears to have been originally signed by the owners of thirteen hundred and ninety-six feet of frontage, but upon its face the signatures of certain signers owning three hundred and three feet had been erased, leaving one thousand and ninety-three feet of frontage represented by the other signers. It is claimed by the appellant that the

erasures were unauthorized, and that by reason of the protest as originally signed the city council was barred from proceeding with the improvement. This proposition, however, depends upon whether the original signers of the document constituted the owners of a majority of the frontage. The record fails to show the amount of the entire frontage of Market street between Hunter and American streets, and we are unable to say whether thirteen hundred and ninety-six feet is a majority thereof. The superior court has found that it was not, and it was incumbent upon the appellant, if he would have that finding set aside, to have it appear from the record that it was contrary to the evidence. Error is not to be presumed, but must in all cases be made to appear before the appellant is entitled to a reversal. It is thus unnecessary to consider whether the erasures on the protest were properly made.

The assessment and other documents connected therewith are made by the statute *prima facie* evidence of its regularity and correctness, and of the prior proceedings and acts of the city council, and their introduction in evidence by the plaintiff threw upon the defendant the burden of establishing the contrary. Such *prima facie* evidence was not overcome by introducing the above protest, unless the defendant also showed that it was signed by the owners of a majority of the frontage. As this protest did not "purport" to be signed by the owners of a majority of the frontage, it was not necessary that the city council should determine or enter of record its judgment that it had not been legally signed by such majority.

The judgment and order are affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[Sac. No. 558. Department One.—November 20, 1889.]

ANDREW JOHNSON, Respondent, v. GOODYEAR MINING COMPANY et al., Appellants.

CORPORATIONS—ACT OF 1897—LIENS OF LABORERS—CONSTITUTIONAL LAW.—The act of March 29, 1897, regulating the contracts of corporations doing business in this state respecting the wages of their employees, and establishing liens upon all of the property of the corporation therefor, is special, discriminating, and arbitrary legislation against corporations doing business in this state, and in favor, of laborers performing labor therefor, infringes the rights of persons to make and enforce their contracts, and denies to such corporations the equal protection of the laws, and is unconstitutional and void.

ID.—“CORPORATION” INCLUSIVE OF INDIVIDUALS—“PERSON”—CONSTRUCTION OF FOURTEENTH AMENDMENT.—The word “corporation” in the act of 1897 means an artificial person created and existing under the laws of the place of its creation; but, as applied to its rights as a defendant, is to be treated as including all of the individuals who are members thereof. It is to be deemed a “person” within the meaning of the fourteenth amendment to the constitution of the United States, which forbids a state to “deny to any person within its jurisdiction the equal protection of the laws.”

ID.—BASIS OF CLASSIFICATION—ARBITRARY SELECTION OF CORPORATION.—Corporations cannot be made the basis of classification for purposes of legislation, unless such classification is founded upon some constitutional or natural distinction, which suggests a reason to justify the diversity of legislation respecting them. There is no reason to justify the arbitrary selection of corporations doing business in this state in order to subject their property to a lien not enforceable against other persons under like circumstances, and to prohibit them from making defenses which other persons may make, and requiring them to pay attorney’s fees in an action at law from which other persons are exempt, and forbidding them and their employees to make contracts which other persons may make; and such arbitrary selection cannot be justified by calling it classification.

ID.—POWER TO AMEND CHARTERS—PROTECTION OF CORPORATIONS.—The power of the legislature to amend or repeal the charters of corporations organized in California does not authorize the legislature, while the corporation exists, to deprive it of the rights, guaranteed to it by the federal constitution, to due process of law and to the equal protection of the laws, nor has the legislature any power to alter, amend, or repeal the charters of foreign corporations doing business in this state.

APPEAL from a judgment of the Superior Court of Sierra County. Stanley A. Smith, Judge.

The facts are stated in the opinion.

Frank R. Wehe, for Appellants.

F. D. Soward, for Respondent.

COOPER, C.—This action was brought to recover from the corporation defendant for labor performed by plaintiff and for labor performed by others for defendant corporation, whose claims have been assigned to plaintiff. Judgment was entered in favor of plaintiff, and defendants appeal. The case comes here on the judgment-roll. The findings show that the defendant corporation, while engaged in business in Sierra county, California, became indebted to plaintiff and some twenty others, who before the commencement of this action assigned their claims to plaintiff, for labor performed by the month at the instance of defendant corporation in its quartz mine in said county, and the same has not been paid. That four hundred dollars is a reasonable attorney's fee to be allowed to plaintiff for the prosecution of the action. As conclusions of law, the court found that plaintiff was entitled to judgment against defendant corporation for the sum of five thousand and thirty-nine dollars and fifty-seven cents and for four hundred dollars attorney's fees, and that the same is a first lien upon all the property described in the complaint, consisting of certain real estate, mining claims, and personal property, consisting of mining materials, tools, engines, cars, wood, lumber, merchandise for mining, etc., and that all the said property, or so much thereof as might be necessary, be sold to pay the plaintiff's judgment, costs, and attorney's fees. Judgment was accordingly entered. The action was brought to recover monthly wages and attorney's fees, and to have the amount declared a lien upon the property of the defendant corporation under an act approved March 29, 1897. (Stats. 1897, p. 231.) As the constitutionality of the act in the main question in controversy here, it will be necessary to give the sections of the act herein discussed in full. The sections material are as follows:

"Section 1. Every corporation doing business in this state

shall pay, at least once a month, each and every employee employed by such corporation, in transacting or carrying on its business, or in the performance of labor for it, the wages earned by such employee during the preceding month; provided, however, that if at the time of payment any employee shall be absent, or not engaged in his usual employment, he shall be entitled to said payment at any time thereafter upon demand.

"Sec. 2. A violation of any of the provisions of section 1 of this act shall entitle each of the said employees to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust; and in any action to recover the amount of such wages, or to enforce said lien, the plaintiff shall be entitled to a reasonable attorney's fee, to be fixed by the court, and which shall form part of the judgment in said action, and shall also be entitled to an attachment against said property. An unrecorded deed shall be no defense to such actions.

"Sec. 3. That on the trial of any action against such corporation for a violation of the provisions of this act, such corporation shall not be allowed to set up any defense for a failure to pay monthly any employee engaged in transacting or carrying on its business the wages earned by such employee during the preceding month, other than the fact that such wages were not earned, except a valid assignment of such wages, a setoff or counterclaim against the same, or the absence of such employee from his usual employment at the time of the payment of the wages so earned by him. . . .

"Sec. 5. No corporation shall require, and no employee of such corporation shall make, any agreement to accept wages at longer periods than as provided in this act as a condition of employment.

"Sec. 6. All wages earned by any employee engaged in the service of any corporation in this state shall be paid in lawful moneys of the United States, or in checks negotiable at face value on demand.

"Sec. 7. Any corporation violating any of the provisions of this act shall be subject to a fine not exceeding one hundred dollars, or less than fifty dollars, for each violation, the

same to be imposed by any court in this state having jurisdiction of offenses in which the penalty does not exceed a fine of one hundred dollars; said fine to be paid, by the judge or magistrate before whom a recovery may be had under the provisions of this act, into the general fund of the treasury of the county in which said conviction may be had."

The plaintiff claims the benefit of the provisions of said act applicable to this case, and the defendants contest the said provisions and every part of said act as being unconstitutional. The statute is said to contravene the following provisions of the constitution of the state: 1. "No person shall be deprived of life, liberty, or property without due process of law" (Const., art. I, sec. 1, subd. 13); 2. "Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens" (Const., art. I, sec. 1, subd. 21); 3. "All laws of a general nature shall have a uniform operation" (Const., art. I, sec. 1, subd. 11); 4. Section 25, article IV, providing that the legislature shall not pass local or special laws in the following cases: "3. Regulating the practice of courts of justice; . . . 24. Authorizing the creation, extension, or impairing of liens; . . . 33. In all other cases where a general law can be made applicable"; 5. Fourteenth amendment to the constitution of the United States: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws." In the decision of this case the constitutionality of the sections of the statute herein set forth is necessarily involved, and it is with a deep sense of the importance of the subject that we enter upon its discussion. We must determine whether the law-making power of the state has in this instance gone beyond the limits of the constitution adopted by the people. This is always a question of great delicacy and one which this court approaches with reluctance, but one in which the duty of the court is plain and which must be met squarely when presented. The same constitution that lays down the fundamental law of our state and prohibits legislation from going outside the powers and limitations therein contained created the courts, and provided that they should stand as guardians of the people and lay their restraining hands upon the legislature in all cases where it has plainly violated the provisions of the people's charter of rights.

It will be observed that the act in question applies only to two classes of persons: 1. Corporations doing business in this state, and not to corporations of any other class; 2. To laborers performing labor for such corporations. It does not apply to the thousands of laborers who may be employed by individuals or copartnerships in the many and varied industries of the state. The word "corporation" in the act means those artificial persons created and existing under the laws of this or some other state; but the word "corporation," as to the rights of defendants, must be treated as though it means the name of all the individuals who are members of the corporation. It has long been settled that the word "person," within the meaning of the fourteenth amendment to the constitution of the United States, applies to a corporation. (*Douglass v. Pacific etc. S. S. Co.*, 4 Cal. 306; *Pasadena v. Stimson*, 91 Cal. 248; *Santa Clara County v. Southern Pac. R. R.*, 118 U. S. 394; *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 181, 189; *Missouri Pac. Ry. v. Mackey*, 127 U. S. 205; *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 154.)

The rule is admirably stated in the *Railway Tax Cases*, 13 Fed. Rep. 743, as follows: "Private corporations are, it is true, artificial persons, but, with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this state, they are formed under general laws, and the Civil Code provides that they 'may be formed for any purpose for which individuals may lawfully associate themselves.' Any five or more persons may, by voluntary association, form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state requiring for their execution and expenditure of large capital are undertaken by corporations. It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think it is well established by numerous adjudications of the supreme courts of the several states that whenever a provision of the constitution or of a law guarantees to persons the enjoyment of prop-

erty, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents."

The case was afterward taken to the supreme court of the United States (Railway Tax Cases, 118 U. S. 396), and on the opening of court, before argument, the chief justice said: "The court does not wish to hear argument on the question whether the provision in the fourteenth amendment to the constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does." In discussing the provisions of the statute in question it will, therefore, be regarded as settled that the word "corporation" refers to the members who constitute the corporation, and that the rights of a corporation are to be measured by the same laws as the rights of a person. The law should be made for all alike, for the rich as well as the poor, for the corporation as well as the laborer. In Cooley on Constitutional Limitations, sixth edition, page 483, it is said: "But everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough. This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." In *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511, it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corpora-

tions would be governed by one law, the mass of the community and those who made the law by another, whereas the like general law affecting the whole community equally could not have been passed." Applying these principles to this act, it is clearly unconstitutional. It gives a first lien to laborers for the amount due them from corporations doing business in this state upon all the real and personal property of such corporations, and does not even require any description of the property or notice in any manner in order to make such lien valid. It seems to give the laborer the right to an attachment against the property of the corporation without requiring him to make the affidavit and file the undertaking required of all other persons in order to procure such attachment. It does not give this lien to any other class of laborers. The thousands of laborers for individuals or copartnerships in the like employment do not have the benefit of it. The laborer toiling at the same kind of labor, felling the forest, tilling the soil, or digging in the bowels of the earth, has no such lien if he is not working for a corporation doing business in this state. The lien attaches to the property of such corporation, but not to the property of an individual under precisely the same circumstances. Under general law, liens are given to all mechanics, artisans, laborers, or materialmen, and against all persons and corporations. Under the present statute, a lien is given to laborers performing labor for the particular corporations named. All other persons in the state, after obtaining an ordinary money judgment, must enforce it by the writ of execution, but laborers for such corporations under this statute have the right to have the court declare the amount found due them a lien on all the property of the corporation, which shall take preference over all other liens except recorded mortgages and deeds of trust. The grocer who, perhaps, has furnished the corporation the food with which the laborer has fed his wife and children may have attached the property of the corporation for the purpose of securing himself, but the laborer's lien by the mighty hand of this statute at once sweeps it away. The materialman or contractor who has furnished the material for or constructed a building for the corporation, and who has filed his notice of lien as provided in the Code of Civil Procedure, and who may

have secured a judgment thereon, must stand by and see his lien destroyed by a decree of court in favor of laborers who performed labor for the corporation since his lien attached. The judgment creditor who has procured a judgment and had it regularly docketed, and who is resting securely under the provisions of the Code of Civil Procedure of this state making his judgment a lien upon all the real estate of the judgment debtor, is surprised to find his lien destroyed by a decree in favor of one who has performed labor for the corporation long since his lien attached. The corporation may have delivered a large amount of personal property by way of pledge to secure a loan, and the money may have been used in paying the laborers employed by the corporation, and yet, under this statute, the court must declare the amount due laborers a prior lien as against the pledgee who has actual possession of the property pledged. The statute gives the laborer a right, in case he recovers judgment, to recover attorneys' fees, which become a part of the judgment. No other class of laborers or persons are given the right to recover attorneys' fees except by virtue of a contract or by virtue of a general statute. The corporation is prohibited from setting up any defense to the action except some two or three. Matters which might be pleaded as a defense by all other persons in the state are not allowed to be so pleaded by the corporation. If the legislature could deprive the corporation of some of the defenses which other litigants on like terms are allowed, it could, by a Draconian edict, deprive it of all of them and say at once that the corporation should make no defense whatever to the action. The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over twenty-one years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment. Business might be such that a corporation could not possibly pay wages without getting

laborers who were willing to wait for their wages until the corporation could get money with which to pay them by marketing its products. The laborer might be interested in the corporation, or for some reason willing to wait until the corporation could pay him. Yet the parties, being able to contract and willing to contract, and desiring for the good of each other to contract, are by this statute forbidden to do so. Not only this, but the corporation shall be subject to a fine of not less than fifty dollars for each violation of the statute. A corporation employing a thousand men and sued by each could not defend the suits without being limited in its defenses to those named in the statute, and being subject to a reasonable attorney's fee in each case. In case it made a contract with the thousand men by which they agreed to work for it three months for one hundred dollars each, they could bring suit and recover before the end of the three months and each recover an attorney's fee, making a thousand attorneys' fees, and the corporation would be subject to one thousand fines of one hundred dollars each, making the modest sum of one hundred thousand dollars in fines, or perhaps the magistrate might in his discretion make the fine fifty dollars in each case and thus reduce it to fifty thousand dollars. We might enumerate many other infirmities in the statute, but the above are sufficient to destroy it. It is probably unnecessary in this opinion to discuss separately the constitutional objections herein briefly pointed out. In *Ex parte Kuback*, 85 Cal. 275, 20 Am. St. Rep. 226, it appeared that the petitioner had been arrested for the violation of an ordinance of the city of Los Angeles making it a misdemeanor for any contractor to make an agreement to pay any laborer for any labor in excess of eight hours in any one day. This court, in discharging the petitioner, said: "It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, as, for example,

females, or infants, the ordinance might be upheld as a sanitary or police regulation, but we cannot conceive of any theory upon which a city would be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day." Statutes similar to the one under discussion have been frequently passed by the legislatures of sister states and as frequently declared unconstitutional by the courts. The legislature of Pennsylvania, in June, 1881, passed what was known as the "store order act," and under its provisions all laborers employed by firms, corporations, or persons engaged in the business of manufacturing must be paid in cash and can make no agreement by which their labor shall be paid for in any goods or store orders.

The supreme court of the state in *Godcharles v. Wigeman*, 113 Pa. St. 437, held the act unconstitutional and in the opinion said: "The first, second, third, and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country cannot be done; that is, to prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee; more than that, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges and consequently vicious and void."

In 1887, the legislature of the state of West Virginia passed an act declaring that all persons engaged in mining coal or other minerals, or in manufacturing them, should not issue for the payment of labor certain orders therein described. The supreme court of the state in *State v. Goodwill*, 33 W. Va. 179, 45 Am. St. Rep. 863, declared the law unconstitutional and in the opinion said: "The property which every man has in his own labor, as is the original foundation of all other property, so it is the most sacred and inviolable.

The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. . . . But we are aware of no well-considered case in which a statute has been upheld that undertook to regulate the dealings between employer and employee, even in this class of occupations; much less in cases that are not impressed with a public trust or duty." This case was immediately followed by *State v. Fire Creek etc. Co.*, 33 W. Va. 188; 25 Am. St. Rep. 891, in which, on the same reasoning, a statute of the state making it unlawful for any person, firm, or corporation engaged in mining or manufacturing to sell goods to any employee at a greater per cent profit than like goods are sold to others was held unconstitutional. In the opinion it is said: "That it is an attempt to do for private citizens, under no physical or mental disabilities, what they can best do for themselves, is apparent. It selects miners and manufacturers as a class, and denies to them privileges which are not only proper and legitimate in themselves, but also to some extent necessary and unavoidable in the conduct of business; privileges which concern private affairs solely, and which are enjoyed by all other classes of citizens." The general assembly of Massachusetts passed an act providing that no employer should impose a fine upon or withhold the wages of an employee engaged in weaving, for imperfections that may arise during the process of weaving. This act was pronounced unconstitutional in an able opinion of the supreme court of the state. (*Commonwealth v. Perry*, 155 Mass. 117; 31 Am. St. Rep. 533.)

The Revised Statutes of Missouri in 1889 made it unlawful for any corporation, firm, or person engaged in mining to issue in payment of wages any order or check payable otherwise than in money unless the same was negotiable or redeemable at its face value in cash or goods at the option of

the holder. The supreme court of the state, in *State v. Loomis*, 115 Mo. 307, held the statute unconstitutional. The legislature of the state of Illinois in 1883 passed a statute requiring that owners and operators of coal mines in the state should weigh the coal at the mines, and that all contracts with laborers by which the weighing of coal at the mines shall be dispensed with shall be void. The statute was held unconstitutional in *Millett v. People*, 117 Ill. 295; 57 Am. Rep. 869. The same rule has been followed by the same court in regard to similar statutes as to "truck stores" (*Froerer v. People*, 141 Ill. 171); as to an act for the weekly payment of wages by corporations. (*Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206.)

The legislature of Texas provided by statute that a railroad company refusing to pay an employee within fifteen days after demand shall be liable to such employee in a sum equal to twenty per cent on the amount due. The statute was held unconstitutional. (*San Antonio etc. Ry. Co. v. Wilson* (Tex. App., June 15, 1892), 19 S. W. Rep. 910.) In the opinion it is said: "If the legislature desires to interfere at all in the enforcement of labor claims, it must do so by laws equal in their operation, and protecting alike the interest of the employer and employee, for the law knows no favorites."

The supreme court of Nebraska, in *Atchison etc. Ry. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356, held unconstitutional a statute of 1867 giving owners of livestock double the value of such property injured or destroyed on a railroad track.

In Michigan, a statute was passed in 1885 authorizing the taxing of an attorney's fee of twenty-five dollars in actions against a railroad company for damages for cattle killed, and the supreme court of the state held it unconstitutional. (*Wilder v. Chicago etc. Ry. Co.*, 70 Mich. 382.) And the supreme court of Arkansas held a similar statute of that state unconstitutional (*St. Louis etc. Ry. Co. v. Williams*, 49 Ark. 492); and the same ruling was made on a similar statute by the supreme court of the state of Washington (*Joliffe v. Brown*, 14 Wash. 155; 53 Am. St. Rep. 868); and by the supreme court of Ohio (*Coal Co. v. Rosser*, 53 Ohio, 12-24; 53 Am. St. Rep. 622.) Cases almost without number could be cited to the same general effect. Among others, see *Durkee v. Janesville*, 28 Wis. 464; 9 Am. Rep. 500; *Grand*

Rapids Chair Co. v. Runnells, 77 Mich. 104; *South & North Alabama R. R. Co. v. Morris*, 65 Ala. 193; *Chicago etc. R. R. Co. v. Moss*, 60 Miss. 641-52; *Denver etc. Ry. Co. v. Outcalt*, 2 Colo. App. 395.

This court in *Bank* held that a statute of the state prohibiting bakers from following their vocation between the hours of 6 o'clock P. M. on Saturday and 6 P. M. on Sundays was a special law and void. (*Ex parte Westerfield*, 55 Cal. 551; 36 Am. Rep. 47.) And the same was held as to a similar statute in relation to barbers. (*Ex parte Jentzsch*, 112 Cal. 469.)

The question is very ably considered and would seem to be finally put to rest by the supreme court of the United States in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150. The statute of the state of Texas allowing owners of stock killed by a railway corporation ten dollars attorney's fees as additional costs was held unconstitutional. In the opinion it is said: "The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. . . . They do not stand equal before the law. They do not receive its equal protection." The reasoning of the highest court in the land in the case cited applies to this case. There is no reason why a different rule as to defenses that may be pleaded and proven and as to the nature of the lien of a judgment should obtain against a corporation than that which applies to other litigants. In *Cullen v. Glendora Water Co.*, 113 Cal. 503, it was held that a part of the fourth section of the act generally known as the Wright act, which provided that, in a proceeding to confirm the organization and bonds of an irrigation district, "a motion for a new trial must be made upon the minutes of the court," was a special law regulating the practice of courts of justice and unconstitutional. In *Pasadena v. Stimson*, 91 Cal. 238, it was held that section 870 of the municipal corporation act of 1883, requiring cities of the fifth and sixth classes to make an effort to agree before instituting condemna-

tion proceedings, was unconstitutional. And so in the late case of *Tulare v. Hevren*, 126 Cal. 226, this court held that that portion of the general act of the state in regard to municipal corporations, by which it is provided that in municipal corporations of the fifth class courts shall take judicial notice of all ordinances of the municipality, was unconstitutional. It is claimed that corporations are a class and that classifications can be made, and that a law is not unconstitutional if it affects all of a class. While this is true, yet the classification must be founded upon differences either defined by the constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation. (*Darcy v. Mayor etc.*, 104 Cal. 645; *State v. Hammer*, 42 N. J. L. 439; Cooley on Constitutional Limitations, 6th ed., 484.) Arbitrary selection can never be justified by calling it classification. (*Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 159.) In this case there can be no reason why a corporation doing business in this state should have its property subjected to a lien, unless the property of other persons in the state under like circumstances is subject to the same kind of a lien, or why such corporations should be prohibited from making defenses which all other persons in the state may make, or why such corporations should pay attorneys' fees or fines in an ordinary action at law while all other persons under like circumstances are exempt from such attorney's fees and fines, or why such corporation cannot create valid liens upon its property other than by a deed or mortgage duly recorded while all other persons in the state may do so, or why such corporations shall be denied the privilege of making a contract as to the manner of payment of its employees while all other persons in the state who are over twenty-one years of age and not incompetent may do so, or why laborers cannot make a valid contract as to the time when their wages shall become due, or the kind of property or money in which they shall be paid. It is said that corporations being the creatures of the state, and deriving their powers from their charters, the same power that created them may alter or amend their charters or deprive them of rights originally given them. This is true as to certain purposes, but the legislature cannot, after creating a corporation and

while it exists, deprive it of the rights guaranteed to it by the federal constitution, nor deprive it of its right to resort to the courts of law, nor take its property without due process of law, nor subject it to unequal and oppressive burdens, nor deprive it of the equal protection of the laws. (*Maine etc. R. R. Co. v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 96 U. S. 700; *Railroad Tax Cases*, 13 Fed. Rep. 754, 755; *Detroit v. Detroit etc. Plank Road Co.*, 43 Mich. 140-47.)

But the act in question applies not only to the corporations existing under the laws of this state, but to all other corporations doing business in this state and in no wise indebted to the state for their charters. Surely, the legislature of this state could not alter, amend, or repeal the charter of a corporation existing under the laws of another state. Counsel for respondent states that similar statutes have been upheld in *Shaffer v. Union etc. Co.*, 55 Md. 74, *State v. Peel Splint Coal Co.*, 36 W. Va. 802, and *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 296.

The statute upheld in *Shaffer v. Union etc. Co.*, *supra*, was one which provided that every corporation engaged in manufacturing or in operating a railroad in a certain county and employing ten hands or more should pay its employees the full amounts of their wages in legal tender money of the United States, and that every contract for the payment of such wages in any other manner be null and void. The ground upon which the act was upheld was that the legislature had the right to alter or amend the corporate charter. It is evident, in view of the authorities hereinbefore cited, that the ruling upon such ground was clearly incorrect. The decision cannot be regarded as of much value as a contribution to jurisprudence, and an examination of the authorities therein cited does not support it.

The case of *State v. Peel Splint Coal Co.*, *supra*, upheld the validity of two statutes of West Virginia, one prohibiting the payment of employees in paper redeemable otherwise than in lawful money, and the other prescribing a certain method for weighing coal at the mouth of a mine. The court consisted of four judges, and two of the four can affirm a judgment. The judgment was affirmed by two judges, and two dissented. The opinion of the two affirming the judgment, while lengthy, is not convincing.

The decision appears to have been based upon practically the same reasoning as the Maryland case, that, the corporation being a creature of the legislature and having a license under the state, the legislature could practically deprive it of any rights. In view of the fact that the opinion is in direct conflict with the two previous decisions of the same state, and is the opinion of two judges as against two others of the same court, it cannot have weight here. It seems to us that anyone reading the able dissenting opinions of Judge English and Judge Brannon would be satisfied that the decision is wrong. Judge Brannon, in his dissenting opinion, says: "If, upon the suggestion of a supposed or real evil, always incident to the transaction of all business, the legislature can restrict lawful contracts, in private business, governments become not simply paternal but oppressive and tyrannical. The 'scrip act' would prevent the farmer, brickmaker, or coal operator from giving to his hands for wages an order to anyone for sugar, coffee, flour, or meat—a great reversal in the right of contracts as used time out of mind."

Hancock v. Yaden, *supra*, turned on the validity of a statute of Indiana which forbade the execution of contracts waiving the payment of wages in money. The court sustained the law, and the decision is the most direct authority in favor of plaintiff's contention of any he has cited. There is no authority cited in the opinion upon which it can legally stand. The court sustained the law upon the ground "that it protected and maintained the medium of payment established by the sovereign power of the nation." Even if this be so, it is self-evident that the legislature, in passing the act, did not have in mind the protection of the coinage. The policy of the law in protecting the coin of the country would justify stringent laws against counterfeiting or debasing it, but certainly could not justify a law that precludes persons from agreeing to receive payment of their debts in anything but money. Since the submission of this case our attention has also been called by counsel for plaintiff to a decision of the circuit court of the United States for the ninth circuit or northern California in the case of *Skinner v. Garnett Gold Min. Co.*, 96 Fed. Rep. 735, in which this very statute was upheld. While we have the greatest respect for the able judge who wrote the opinion, yet it is not binding on us as a

precedent, and the reasoning therein does not convince us of its correctness, nor in our opinion do the authorities therein cited support it. The learned judge refers to the case of *Louisville etc. R. R. Co. v. Tennessee R. R. Commission etc.*, 19 Fed. Rep. 679. In that case the circuit court of the United States held unconstitutional an act of the legislature of the state of Tennessee creating a railroad commission and making certain discrimination against railroads. In the opinion it is said: "Their general object [referring to the provisions of the fourteenth amendment] is to secure to all citizens in like circumstances an equality of legal rights and to protect minorities and other interests not strong enough to protect themselves against the aggressions of the majority to restrain all injurious legislation discriminating against persons and property; . . . to compel an equal distribution of the burdens of government upon every citizen, natural or corporate, coming fairly within the purview of the law, and to give to everyone an equal right to invoke the remedies prescribed by law for the redress of wrongs done either to his person, reputation, or property." In the opinion of the learned judge it is further stated that the act of March 31, 1891 (Stats. 1891, p. 195), similar to the statute in question relating to the payment of wages of laborers by corporations, has been construed in *Keener v. Eagle Lake Land etc. Co.*, 110 Cal. 627, and *Ackley v. Black Hawk etc. Co.*, 112 Cal. 42; and that the act in question is directed to the same end as the statute of 1891. The act was under consideration but not passed upon as to its constitutionality in either case. In each case it was held that the laborers were entitled to an ordinary judgment such as is granted to other litigants, and in each of the cases the judgment of the lower courts as to counsel fees and as to the judgment being declared a lien was reversed. In the case in 110 California it is said in conclusion of the opinion: "That portion of the judgment awarding counsel fees, and declaring that he plaintiff is entitled to a lien upon the property of the defendant, and directing a sale of such property, is reversed." And in the case in 112 California the same ruling was made and the same language used in reversing the portion of the judgment as to counsel fees and declaring the judgment a lien. The act of 1891 has, however, by this court in *Bank*,

been held unconstitutional as special legislation in favor of a class and making an arbitrary classification. (*Slocum v. Bear Valley Irr. Co.*, 122 Cal. 555; 68 Am. St. Rep. 68.)

The court properly overruled the defendants' demurrer to the complaint. The allegation as to the assignment of the several causes of action prior to the time of the commencement of the action to plaintiff was sufficient when attacked by general demurrer. That portion of the judgment in favor of plaintiff and against the defendant corporation for five thousand and thirty-nine dollars and fifty-seven cents, with costs, should be affirmed. The portion awarding the plaintiff four hundred dollars attorneys' fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation and to have a commissioner appointed to sell the property, should be reversed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion that portion of the judgment in favor of plaintiff and against the defendant corporation for five thousand and thirty-nine dollars and fifty-seven cents, with costs, is affirmed. The portion awarding the plaintiff four hundred dollars attorneys' fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation and to have a commissioner appointed to sell the property, is reversed.

Harrison, J., Garoutte, J. Van Dyke, J.

Hearing in Bank denied.

[Sac. No. 292. Department One.—November 21, 1899.]

WILLIAM HOLLENBEAK, Appellant, v. JOHN MCCOY
et al., Respondents.

INJUNCTION—EXECUTION OF JUDGMENT.—An injunction will not lie to restrain the execution of a judgment upon grounds which were available to the defendant in the original action.

ID.—INSUFFICIENT COMPLAINT—JUDGMENT IN JUSTICE'S COURT—NEGLECT TO APPEAL.—A complaint for an injunction to restrain the enforcement of a judgment in the justice's court, from which it ap-

pears that the grounds therefor were known to the plaintiff within a week after the verdict against him, and that the plaintiff negligently failed to avail himself of the remedy therefor by appeal within the time limited by law, does not state a cause of action for the interference of a court of equity.

1D.—PROMISE OF JUSTICE TO GRANT NEW TRIAL—POSTPONEMENT OF HEARING—DENIAL OF MOTION—INSUFFICIENT EXCUSE.—The reliance of the plaintiff in the injunction suit, as defendant in the justice's court, upon the promise of the justice to grant a new trial, which the plaintiff in the justice's court does not appear to have participated in or known, and the postponement of the hearing of the motion until after the expiration of the time for appeal, and the final denial thereof by the justice, cannot excuse the neglect of the defendant to appeal from the judgment, or entitle him to relief in equity against the judgment.

APPEAL from a judgment of the Superior Court of Shasta County. Edward Sweeny, Judge.

The facts are stated in the opinion of the court.

Clay W. Taylor, J. Chadbourne, and Francis Carr, for Appellant.

F. P. Primm, and James T. Boyd, for Respondents.

HARRISON, J.—The plaintiff was sued by the defendant McCoy in the justice's court of Fall river township, county of Shasta, for having maliciously caused his arrest upon a criminal charge, and at the trial of the action a verdict and judgment thereon was rendered against him. A motion for a new trial in the justice's court was denied, and he then appealed from the judgment to the superior court, where his appeal was dismissed upon the ground that it was not taken within thirty days after the judgment was rendered. The present action was brought by him to procure a decree enjoining the enforcement of this judgment, and directing it to be canceled of record. In the title of the action he has named as defendants, in addition to the plaintiff in the original suit, "F. A. Moers, justice of the peace," and "C. W. Levens, constable;" but there are no allegations in the complaint with reference to either of these last defendants, nor is it alleged that Moers was the justice before whom the action was tried. The grounds upon which he seeks the relief are, in substance, that certain persons were improperly admitted as

jurors to try the cause, and that their verdict was arrived at by chance and in disregard of the evidence and the law applicable thereto. It is also alleged in the complaint that after the entry of judgment "the justice of the peace holding said court voluntarily informed him" that the verdict of the jury was against the law and evidence, and that, if he should move for a new trial of the action, he would grant the motion; and that, relying upon such information, he made such motion, and that the hearing thereof was set by the justice for a day beyond the time allowed by law for appeal from the judgment to the superior court, and was then denied; and that thereafter he took an appeal, which was dismissed upon the ground that it was not taken within the time allowed by law. To this complaint the defendants filed a general demurrer, which was sustained by the court, and from the judgment entered thereon the plaintiff has appealed.

The complaint fails to show any ground for the interference of a court of equity to restrain the enforcement of the judgment rendered in the justice's court. It appears from the complaint that the plaintiff was informed of all the grounds which he urges in support of his action within a week after the verdict was given by the jury, and he then had a complete remedy against all the errors committed at the trial by an appeal to the superior court. His failure to take such appeal until more than thirty days after the rendition of the judgment was his own negligence, and cannot be invoked as a ground for the interference of equity. (*Quinn v. Wetherbee*, 41 Cal. 247; *Daly v. Pennie*, 86 Cal. 552; 21 Am. St. Rep. 16.) "The correctness of a judgment cannot be reviewed in an independent action upon grounds, which were available to the litigant in the original action." (*Johnson v. Reed*, 125 Cal. 74.) Neither is the plaintiff entitled to relief by reason of his having relied upon the promise of the justice to grant him a new trial. He does not claim that the plaintiff in the action in that court was a party to this promise, or knew that it had been made. He was, moreover, bound to know that the time for an appeal from the judgment was not prolonged by any proceedings before the justice's court. The judgment is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1781. Department One.—November 21, 1899.]

THOMAS DONNELLY (LOUISA HELBING, Substituted), Appellant, v. FRANK P. ADAMS et al., Respondents.

MECHANICS' LIENS—VOID CONTRACT—MISREFERENCE TO SIGNED SPECIFICATIONS.—Under section 1183 of the Code of Civil Procedure, it is necessary that the whole contract for a building or improvement at a price exceeding one thousand dollars shall be in writing and signed by the parties thereto; and where there is a misreference in such contract to plans and specifications signed by the parties, which were not in fact so signed, the contract is void, and cannot be made the basis of a lien in favor of the contractor.

ID.—PAROL EVIDENCE—ORAL WAIVER OF STIPULATION—MISDESCRIPTION. The false reference in the contract to signed plans and specifications, can neither be aided by parol evidence, nor cured by any oral waiver or oral agreement, dispensing with the signature thereto. There is no written stipulation as to signatures to be waived; but there is a misdescription of a material part of the contract as being signed, which was not so; and neither the whole nor any part of the void contract can be made effective by an oral waiver of any other part of it.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

Charles S. Peery, and R. Percy Wright, for Appellant.

Stafford & Stafford, for Respondent Frank P. Adams.

Tobin & Tobin, for Respondent Hibernia Savings and Loan Society.

GRAY, J.—This case has been here before (*Donnelly v. Adams*, 115 Cal. 129), and it was then held that the building contract involved in the case was void because it referred to the plans, drawings and specifications as having been signed by the parties to the contract, when in fact they were not so signed. The court held this to be "a false reference in a written contract which cannot be aided by parol evidence," and that thereby "the contract is left inchoate and not com-

plete, and could not form the basis of recovery." The judgment, decreeing foreclosure of a mechanic's lien for work and materials done and furnished pursuant to said alleged contract, was reversed and the cause remanded. The plaintiff then amended his complaint as to the plans and specifications so as to make it read as follows: "That thereafter, and prior to the commencement of the work upon said building, the provision of the said contract, requiring the said plans and specifications to be signed by the parties thereto, was, by the verbal consent of both parties thereto, duly waived, and the said specifications were not signed by the defendant Frank P. Adams, but the said building was duly erected and completed according to the plans and specifications made by B. E. Hendrickson, the authorized architect employed by the owner, and which were kept in the office of the said architect, subject to the inspection of the parties to the said contract and others concerned in the erection." To the complaint as amended the defendants interposed a general demurrer, which was sustained by the court and the action dismissed. From the judgment of dismissal the plaintiff appeals.

The amendment to the complaint did not cure the defect pointed out on the former appeal. There was no such stipulation in the builder's contract as the amendment to the complaint says was waived. It was not provided or required in the contract that the plans and specifications should be signed by the parties; they were merely referred to and described as already signed. This was a misreference or misdescription that could not be cured by any oral waiver or oral agreement. It is necessary, under section 1183 of the Code of Civil Procedure, that the whole contract shall be in writing and signed by the parties thereto. In the present case the plans and specifications are a most important part of the contract; without them the nature and extent of the work and materials to be furnished cannot be ascertained. They should have been made a part of the written contract which was signed by the parties in such a way that no resort to oral evidence would be necessary to show that it was the intention of the parties that they should be a part of such contract. This not having been done, the whole contract, as this court held on the

former appeal, is void. Neither the whole of it nor any part of it can be made valid by an oral waiver of any other part of it. Oral evidence to contradict or vary the terms of the written contract will be equally improper with or without the amendment. In any view that may be taken of the amendment to the complaint it obviates none of the objections upon which the former decision was based. (*West Coast etc. Co. v. Knapp*, 122 Cal. 79; *Willamette etc. Co. v. Los Angeles College Co.*, 94 Cal. 229; *Worden v. Hammond*, 37 Cal. 61.)

We advise that the judgment be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[L. A. No. 600. Department Two.—November 22, 1899.]

COUNTY BANK of SAN LUIS OBISPO, Respondent, v.
MEYER GREENBERG et al., Defendants. B
SCHWARTZ, Appellant.

ACTION UPON NOTE—SECURITY FOR OVERDRAFT—PLEADING—NONPAYMENT OF OVERDRAFT AND NOTE.—In an action by a bank upon a promissory note given by the defendants to secure the bank against an overdraft by a partnership firm, a complaint alleging that between the making and delivery of the note, and the time of its maturity, the overdraft by the firm greatly exceeded the amount of the note, and that no part of the overdraft, or of the principal sum or interest of the note has been paid, states a cause of action and shows a liability of the defendants to the plaintiff for the full face value of the note.

ID.—INTEREST UPON OVERDRAFT—AMOUNT OF NOTE—VERDICT.—Where the amount of the overdraft, with interest thereon at the legal rate, after crediting all payments, exceeded the full amount of the note bearing interest at ten per cent per annum, payable quarterly, and compounded at the same rate, to the date of the verdict, the verdict should be for the full amount of the note, but for no sum in excess thereof.

ID.—REFUSAL OF INSTRUCTION AS TO RATE OF INTEREST—HARMLESS RULING.—The refusal of an instruction requested by the appellant as to the rate of interest to be charged in the absence of a special

agreement cannot be held injurious to the appellant if the record contains no specification of the insufficiency of the evidence to sustain the verdict in the allowance of legal interest on the overdraft, and if there is no question on the evidence that the amount of the overdraft and legal interest equaled the amount of the note, and appellant at the trial recognized that legal interest should be allowed on the overdraft, in computing the amount of the verdict on the note.

ID.—PLEADING—ADMISSION OF EXECUTION OF NOTE.—Where a copy of the note sued upon is set out in the complaint, and the answer is not verified, the genuineness and due execution of the note are deemed admitted.

ID.—AMOUNT OF OVERDRAFT—CONTINUED TRANSACTIONS—VARYING AMOUNT—CONCRETE OBLIGATION—MISLEADING INSTRUCTIONS.—The note to secure the amount of the overdraft contemplated continuing transactions with the bank, and a varying amount of overdraft from time to time; but it secured whatever overdraft existed at the maturity of the note, not exceeding the amount of the note and accrued interest. The overdraft thus secured was treated by the parties, and should be treated at the trial, as one concrete obligation; and offered instructions based upon the theory of several obligations for the overdrafts were properly refused as misleading.

ID.—QUESTION FOR JURY—COMPUTATION OF AMOUNT OF OVERDRAFT.—The final amount of the overdraft was the question for the jury to determine, and was to be determined by subtracting all that had been paid into the bank from all that had been drawn out, giving credits on account of interest as the law or the agreement between the parties might indicate.

ID.—MORTGAGE OF FIRM TO SECURE OVERDRAFT—FORECLOSURE—SEPARATE NOTE AS COLLATERAL—RES ADJUDICATA—CONSTRUCTION OF CODE.—A mortgage executed to the bank by a member of the firm to secure the amount of the overdraft made by the firm is a distinct obligation from a separate promissory note executed by the members of the firm and the appellant as collateral security for the same overdraft, and does not secure the payment of such note. The foreclosure of the mortgage does not operate as an adjudication to bar a suit on the note, and section 726 of the Code of Civil Procedure is inapplicable to the case.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion in this case and in that rendered upon the former appeal, in 116 Cal. 467.

Graves & Graves, for Appellant.

Wilcoxon & Bouldin, and J. M. Wilcoxon, for Respondent.

GRAY, C.—The defendant Schwartz appeals from a judgment in plaintiff's favor and from an order denying a new trial. The case was here on a former appeal (*County Bank of San Luis Obispo v. Greenberg*, 116 Cal. 467), wherein will be found a statement of the facts.

1. On the return of the case to the trial court the complaint was amended so as to make it show that Greenberg Brothers, between the making and delivery of the note on which the suit is based and the time it was due, March 5, 1895, had overdrawn their account with plaintiff to an amount considerable in excess of the note; that said note was given to secure said overdraft, and that no part of said overdraft had been paid. This amendment cured the defect in the complaint for which the judgment was reversed on the former appeal. The complaint as thus amended showed the existence of the overdraft at the time the action was brought, that no part of either the note or overdraft had been paid, and clearly showed a liability of Schwartz to plaintiff for the full face value of the note. There is, therefore, no merit in the argument that the demurrer to the amended complaint should have been sustained.

2. The overdraft with interest at the legal rate, after giving proper credit for the several payments thereon, exceeds the amount due on the note on the date of the rendition of the verdict, November 19, 1897. The note was dated March 5, 1894, and was given for five thousand dollars, with interest at ten per cent per annum, payable quarterly, and, if not so paid, to be added to the principal and bear like interest. According to its terms there was due on the note on November 19, 1897, seven thousand two hundred and ten dollars and seven cents, and the verdict should have been limited to this amount. The judgment is, therefore, one hundred and forty-eight dollars and fifty-five cents in excess of the amount to which the plaintiff was entitled at the date of its entry.

3. The refusal of the court to give instruction No. 8, setting forth the rate of interest to be charged in the absence of a special agreement, could not injure appellant in any way, for the reason that plaintiff's action was based on a written obligation and he was entitled to recover the face value of the

note if the overdraft with interest thereon reached that amount; and there is no question on the evidence that it did reach that amount, even if we allow interest on the overdraft at no more than the legal rate. There is no specification in the record that the verdict is contrary to evidence for having allowed interest at the legal rate on the overdraft. Indeed, appellant seems to have proceeded at the trial on the theory that such interest was to be allowed; his eighth instruction and second specification of particulars indicate this and render it unnecessary to decide the point made in the concluding paragraph of appellant's brief.

4. The instruction that the answer of the defendants admits the due execution by all of them of the note sued on was not error. A copy of the note was set out in the amended complaint, and the answer was not verified. The genuineness and due execution of the instrument are therefore deemed admitted. (Code Civ. Proc., sec. 447.)

5. Instructions 6 and 7 offered by appellant and refused by the court are inapplicable to the undisputed facts of the case. There were no "several obligations" from Greenberg Brothers to plaintiff, as is assumed in these instructions. Greenberg Brothers had but one obligation at the plaintiff's bank, and that was the overdraft that the note sued on was given to secure. All that was paid into the bank by the firm was paid on that overdraft and all that was drawn out was added to it. The amount of the overdraft varied from time to time, no doubt, but the parties treated it as one concrete obligation, and so it should be treated on the trial of the case. It was held on the former appeal that the note was given "to secure whatever overdraft might exist on March 5, 1895, not exceeding the amount of the obligation and accrued interest thereon, . . . and contemplated continued transactions between them and the bank." The amount of the overdraft was the question for the jury to determine, and that was to be fixed by subtracting all that had been paid into the bank from all that had been drawn out, giving such credits on account of interest as the law or the agreement between the parties might require. These instructions, therefore, based on the theory of several obligations between the parties, could only confuse and mislead and were properly refused.

6. The mortgage that was foreclosed at the suit of plaintiff herein against Meyer Greenberg was not given to secure the obligation upon which the present action is based. To quote from appellant's brief: "The makers of the note are sureties or guarantors for the payment of the overdraft," and the mortgage, by its terms, was limited to a security for the performance of the original obligation of the Greenbergs to pay this overdraft, and in no sense was it a security for the performance of the collateral personal obligation of appellant on the note given to secure the same overdraft. Hence, we say that the previous suit on the mortgage given to secure the overdraft was no bar to this suit on the note given as collateral security for the same overdraft. Section 726 of the Code of Civil Procedure, providing that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage," is inapplicable to the case in hand, and, therefore, instructions 4 and 5 were properly refused. These views find support in the following well-considered cases: *Vandewater v. McRae*, 27 Cal. 596; *Merced Bank v. Casaccia*, 103 Cal. 641; *Carver v. Steele*, 116 Cal. 116.

We advise that the judgment and order be reversed and the cause remanded, with directions to the court below to proceed to try the case anew, unless, within twenty days after the filing of the *remittitur* in the court below, the plaintiff shall file with the clerk of that court a written consent that the judgment be modified by striking out the amount therein awarded and inserting in lieu thereof the sum of seven thousand two hundred and ten dollars and seven cents, and on such consent being filed it is ordered that the judgment be modified accordingly as of the date of the original judgment.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded, with directions to the court below to proceed to try the case anew, unless within twenty days after the filing of the *remittitur* in the court below the plaintiff shall file with the clerk of that court a written consent that the judgment be modified by striking out the damages therein awarded and inserting in

lieu thereof the sum of seven thousand two hundred and ten dollars and seven cents, and on such consent being filed it is ordered that the judgment be modified accordingly as of the date of the original judgment.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1902. Department Two.—November 22, 1899.]

DANIEL SNIBLEY, Respondent, v. WILLIAM PALMTAG, Appellant.

ELECTION CONTEST—ABATEMENT—DEATH OF CONTESTANT AFTER JUDGMENT AGAINST CONTESTEE—APPEAL—SUBSTITUTION OF ADMINISTRATOR.—Neither the contestant of an election nor his estate can escape liability for costs, in case the contest is unsuccessful; and the action does not abate by the death of the contestant after a judgment annulling the election of the contestee, nor can the contestee be deprived thereby of his right of appeal. Upon death of the contestant pending the appeal, the administrator of his estate may be substituted upon motion in the supreme court, and the case will be heard upon its merits.

APPEAL from a judgment of the Superior Court of San Benito County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

H. W. Scott, and Briggs & Hudner, for Appellant.

A. M. Cunning, and L. W. Jefferson, for Respondent.

Temple, J.—This is an election contest for the office of supervisor of San Benito county. Appellant was declared elected by the board of canvassers. Respondent, being the opposing candidate, contested the election under the provisions of the Code of Civil Procedure, charging that illegal votes were counted for Palmtag, and that upon a proper count contestant would be found to have been elected.

Upon the trial, the court found that contestant and contestee had received the same number of legal votes, and ordered and adjudged that the alleged election of William

Palmtag, "whose election to said office was so declared by the board of supervisors of San Benito county, state of California, on November 14, 1898, be and the same is hereby set aside, canceled, and annulled." Defendant appeals, and contends that having found that there was a tie, and, therefore, that no other person had received a greater number of legal votes than the contestee, the election could not be annulled, but the contest should then be dismissed. But he also contends that the court committed errors in the count and erroneously found that appellant did not receive the highest number of legal votes.

After the appeal had been taken the respondent died, and the contestee now asks the court to remand the case, with directions to the trial court to vacate the judgment and dismiss the action. He takes the ground that the action abated upon the death of contestant. The estate of deceased, he argues, cannot be interested in the action; it will not be benefitted by any possible judgment, and is not an elector, and the legal representative may not be such. The statute does not provide for the contingency of the death of the contestant, and on one can be substituted in his place.

The contest is a special statutory proceeding, and it often happens in such cases that the legislature has failed to anticipate and provide for all possible contingencies. Any elector may inaugurate the contest, and had Snibley not been the opposing candidate the same difficulty would have existed. And the trouble would have been the same if the court had found that Snibley had received a majority of the legal votes, or if the finding had been in favor of the contestee, and he had died after judgment. In either case it seems very hard if the survivor, against whom the judgment has been rendered, cannot appeal from it.

Were the cause of action one which would die with the person, still after judgment the action does not abate. It is then property, and goes to the estate of the successful party if he dies after judgment. The judgment may be attacked and set aside on appeal, but so long as it stands it is not affected by the death of either party. (*Atlantic Dock Co. v. Mayor etc.*, 53 N. Y. 64; *Shafer v. Shafer*, 30 Mich. 163; *Danforth v. Danforth*, 111 Ill. 236.)

It is not correct to say that the estate of the deceased has no interest in the controversy. It is provided in section 1125 that if the proceeding be dismissed for want of prosecution, or if the election be affirmed, "judgment must be rendered against the party contesting such election for costs." Having commenced the proceeding and prosecuted it to judgment, by which the contestee is deprived of an office to which he had been declared elected, neither he nor his estate could escape the responsibility he has assumed. Appellant has a right to his appeal, and there is a chance that the judgment may be reversed, and that upon a retrial the election will be affirmed.

The motion of the appellant is denied, but upon causing the representative of the estate of Snibley to be substituted the case will be heard.

Henshaw, J., and McFarland, J., concurred.

[Sac. No. 596. Department Two.—November 22, 1899.]

G. B. DEMARTINI, Appellant, v. W. A. ANDERSON, Ex-cutor, etc., Respondent.

LEASE OF HOUSE—IMMORAL PURPOSES—KNOWLEDGE OF LESSOR—VOID CONTRACT.—A lease of a house for a term of years for the purpose of conducting it as a house of prostitution and assignation, with the knowledge and consent of the lessor, is unlawful and void; and a court will not aid either party in an attempt to enforce such a contract.

ID.—EVIDENCE—BAD CHARACTER OF INMATES—REPUTATION OF HOUSE.—Evidence is admissible to prove the bad character and reputation of the inmates and frequenters of the house leased, and to prove the reputation of the house as a house of ill-fame, both prior and subsequent to the date of the lease.

ID.—PRIOR REPUTATION—KNOWLEDGE OF LESSOR—ESTOPPEL.—Evidence of the prior bad reputation of the house before the date of the lease is not only admissible as tending to show its reputation afterward, but also as tending to show the knowledge of the lessor, who may not shut his eyes to that which is patent to the community, and stop his ears from that which has become notorious among his neighbors, and say he has no actual knowledge.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. *Matt. F. Johnson*, Judge.

The facts are stated in the opinion of the court.

L. T. Hatfield, for Appellant.

A. A. De Ligne, Johnson, Linforth & Whitaker, and Hiram W. Johnson, for Respondent.

McFARLAND, J.—Appeal by plaintiff from a judgment in favor of defendant, and from an order denying his motion for a new trial.

The action is against the respondent Anderson, as executor of Manuel Dubois, deceased, to recover rent upon a written lease of a certain house and premises on Third street in Sacramento city. It is alleged that the lease was executed by appellant and the deceased on the first day of April, 1895, and was for a term of five years from and after that date, at the rental of fifty dollars per month, which the deceased, as lessee, promised to pay; that he paid the rent until his death, which occurred in April, 1897; and that since then respondent has refused to pay any rent and has repudiated the lease. The defense was that the house was leased by the deceased from appellant for the purpose of conducting it as a house of prostitution and assignation, and that appellant knew of this purpose at the time of the execution of the lease; and that the lease, having thus been made for immoral purposes, against good morals and public policy, was and is illegal and void. The court found the facts to be as averred in the answer—that at the time of the execution of the lease the house was a house of prostitution, and was conducted as such with the knowledge and consent of appellant; that it continued to be so conducted from the date of the lease to the death of the deceased with the knowledge and consent of appellant; and that it was rented to the deceased by appellant with the latter's knowledge that it was to be used for the purposes aforesaid.

If the lease, with the knowledge and consent of appellant, was made for the purposes alleged in the answer and found by the court, it was unlawful and void; and a court will not

aid either party in an attempt to enforce such a contract. (Civ. Code, sec. 1667; Pen. Code, sec. 316; *Chateau v. Singla*, 114 Cal. 93, 55 Am. St. Rep. 63.)

The contention of appellant—waiving the objection of the respondent that there are no sufficient specifications—that the evidence did not justify the findings above referred to, cannot be maintained; it is sufficient to say that it would be difficult to conceive how the court could have been justified in not finding as it did.

The only contention for a reversal which calls for especial notice is that the court admitted evidence which was inadmissible and prejudicial to defendant. On this subject the transcript shows one hundred and one specifications of alleged errors; but the main points to be gathered from them all are that the court erred in receiving evidence of the characters of the inmates of the house and of the reputation of the house itself as one of ill-fame.

As to the evidence of the characters of the intimates and frequenters of the house, the cases seem to all concur in holding it admissible. In section 1452 of 2 Wharton's Criminal Law the author, although he somewhat questions the rule that the bad reputation of the house may be shown, says: "But however this may be, it is settled that the bad reputations of the persons visiting the house may be put in evidence"; and as the current of authorities is all that way the question need not be further discussed.

Whether or not the reputation of the house, itself, as one of ill-fame may be shown, is a question about which the cases are somewhat conflicting; but we think that the weight of authority, and the better reason, support the affirmative of the proposition. It has been so held in a large number of states, and the following are some of the cases which so hold: *Sylvester v. State*, 42 Tex. 496; *Morris v. State*, 38 Tex. 603; *Allen v. State*, 15 Tex. App. 321; *State v. McDowell*, Dud. (S. C.) 346; *King v. State*, 17 Fla. 183; *O'Brien v. People*, 28 Mich. 213; *Betts v. State*, 93 Ind. 375; *Graeter v. State*, 105 Ind. 271; *State v. Brunell*, 29 Wis. 435; *State v. Smith*, 29 Minn. 193; *Territory v. Bowen*, 2 Idaho, 607; *Drake v. State*, 14 Neb. 535; *Cadwell v. State*, 17 Conn. 467; *Commonwealth v. Kimball*, 7 Gray, 328. (See, also, Moore's Criminal

Law, par. 1072, and cases there cited to support the statement in the text that "a house of ill-fame may be proved to be such by direct evidence, or by reputation, or by circumstances—as that the inmates were reputed to be prostitutes.") We are much impressed with the reasoning and consistency of the cases which hold that evidence of the reputation of a house of prostitution is admissible that with the reasoning and consistency of those cases which hold differently; for the latter, while excluding evidence of the reputation of the house, permit evidence of the reputation of the inmates of the house for the purpose of showing that it is a house of prostitution—and this seems to be a distinction without much difference.

Nearly all the cases to which we have been referred by counsel on both sides were criminal cases where parties were being criminally prosecuted for either keeping houses of prostitution or leasing them for that purpose; but if the rule as above stated applies to a criminal prosecution where a man's liberty is at stake, it certainly applies with more force to a mere civil case where nothing is involved except property.

Appellant complains because evidence was admitted tending to show the character of the house some months before and down to the time of the execution of the lease; but this evidence was clearly admissible as tending to show the appellant's knowledge of the character of the house and for what it was used, and what it was expected to be used for. Knowledge, of course, had to be brought home to the appellant, and evidence tending to show that knowledge was properly admitted. In *Graeter v. State, supra*, the court said: "The owner of a house so occupied may not shut his eyes to that which is patent to the community around him, and stop his ears from that which has become notorious among his neighbors, and say he has no actual knowledge"; and in *Cadwell v. State, supra*, the court said: "Evidence of reputation of the house previous to a particular time conduces to show its reputation afterward."

The appellant's brief consists to a very great degree in the mere copied statements of his specifications of errors as they appear in the transcript; and we think that what has already been hereinbefore said disposes of the material points upon

which the claim for a reversal of the judgment is based. We think that the case was properly tried and correctly decided; and we see no reason for disturbing the judgment of the court below.

The judgment and order appealed from are affirmed.

Henshaw, J., and Temple, J., concurred.

Hearing in Bank denied.

[Sac. No. 550. Department Two.—November 22, 1899.]

THE LAKE SHORE CATTLE COMPANY, Respondent, v.
THE MODOC LAND AND LIVESTOCK COMPANY,
Appellant.

NEW TRIAL—ENGROSSMENT OF STATEMENT—REFERENCE TO DOCUMENTS ON FILE.—A statement on motion for new trial is not defectively engrossed for the purposes of the hearing on the motion, where it makes exact reference to documents on file in the action, as exhibits, with the direction "here insert," without transcribing them at length, though in printing the transcript on appeal the documents referred to must be inserted at length.

ID.—DISMISSAL OF MOTION—ABUSE OF DISCRETION.—Where the party moving for a new trial engrossed the statement and presented it to the judge for his signature in due time, and trifling omissions noted by him were at once corrected, but the judge departed from the county, and remained absent for a month, and, after a return of ten days, again left the county, and during his second absence, a motion to dismiss the motion for negligence of the mover was served, upon the hearing of which the properly engrossed statement was presented to the judge for his certification, the dismissal of the motion for negligence was an abuse of discretion. The omission to present the statement during the interval of ten days was not such gross negligence as to warrant the dismissal.

APPEAL from orders of the Superior Court of Modoc County dismissing a motion for new trial and refusing to vacate the order of dismissal and from an order taxing costs. J. W. Harrington, Judge.

The facts are stated in the opinion of the court.

Spencer & Raker, and Clarence L. Raker, for Appellant.

Jarret T. Richards, E. C. Bonner, G. F. Harris, H. L. Spargur, and D. W. Jenks, for Respondent.

HENSHAW, J.—This appeal is from the order of court dismissing defendant's motion for a new trial for want of diligence in its prosecution, and for unnecessary and vexatious delay in the engrossment of the statement on the motion. The statement on motion for a new trial was settled upon September 25, 1896, by the Hon. C. L. Clafin, then judge of the trial court, and the judge who tried the cause. The moving party was given until November 25, 1896, to engross the statement as settled. Before November 25th the statement was delivered to the adverse attorneys for comparison, and to the judge for his certificate and signature. It did not receive the judge's signature, but no intimation was made to appellant's attorneys, either by the judge or by opposite counsel, that the engrossed statement was defective or incomplete. Later appellant's attorneys obtained possession of the engrossed statement, and presented it to the judge for his signature on December 30, 1896. The judge's term of office was about to expire, and the attorneys were informed that he proposed leaving the county and going to Los Angeles, as in fact he did. The judge returned to and was present at the county seat for about ten days in the early part of the month of February, but during that time the attorney for the appellant who had charge of this particular matter, being much pressed with other business affairs, neglected to re-present the statement to the judge. On February 17th, the plaintiff in the action served notice upon defendant of its motion to dismiss defendant's motion for a new trial upon the indicated grounds, and upon the same day served a subpoena *duces tecum* upon one of the attorneys for defendant to produce the settled statement. Upon the hearing these facts were disclosed, and in addition it was shown that Judge Clafin had never refused to sign the engrossed statement, but had made objection to signing the statement offered to him upon the ground that it was incomplete in certain particulars. Appellant here further showed that it had been unable to forward the statement to Judge Clafin in Los Angeles, or to take it to him for his certification, because of the subpoena *duces tecum* which had been served upon its attorney, and it sought leave of court

to withdraw the statement and take it to Judge Clafin for his certification. Permission to do so was refused. The alleged defect in the engrossed statement was that certain documents on file in the action had not been transcribed at length, but exact reference had been made to them as exhibits, with the direction "here insert." But as to documents on file, this is a sufficient engrossment for the purposes of the hearing before the trial court. It is a procedure countenanced by the code (Civ. Code, sec. 648), and justified by our decisions. Of course, in printing the transcript on appeal to this court the documents must be inserted at length. (*Sharon v. Sharon*, 79 Cal. 633; *Hayne on New Trial and Appeal*, sec. 156, et seq.)

Aside from any consideration of the question of the court's power to dismiss a motion for a new trial pending the settlement of the statement upon the motion, and conceding that it has such power, we think its exercise under the circumstances indicated was an abuse thereof. Appellant had engrossed and presented its statement in due time. Judge Clafin's refusal to certify to it seems to have been based upon one or two minor and trifling omissions which were at once corrected. He left the county the day after this refusal, remaining away for a month and returning for but ten days in the early part of February. Within a few days after his second departure this motion to dismiss was noticed and served. At the hearing appellant showed a statement engrossed within the meaning of the law and sought leave of court to obtain the certification of Judge Clafin, for Judge Clafin had never refused to act, and in fact at a later time, as appears by another appeal in this case, did actually certify to the statement presented to him. If it be said that the appellant was negligent in not seeking out the judge and obtaining his signature during the ten days of his last stay in the county seat, it was not, we think, negligence so gross or of such consequence as to warrant the extreme penalty imposed by the court.

We think in so doing that the court abused its discretion.

The second appeal, that from defendant's motion to vacate the order of dismissal, upon the ground that it was improvidently made, needs no consideration.

The third appeal, that from the order of the court taxing

costs, presents no especial matters calling for comment. The evidence was sufficient to support the items allowed by the court, and they appear to have been legal charges.

The order of the court taxing costs is therefore affirmed, and the order of the court dismissing defendant's motion for a new trial is reversed.

McFarland, J., and Temple, J., concurred.

[Sac. No. 531. Department One.—November 23, 1899.]

H. C. BRINGHAM, Appellant, v. H. L. W. KNOX et al.,
Defendants. SIERRA VALLEYS RAILWAY COM-
PANY et al., Respondents.

MECHANIC'S LIEN—MATERIALS FOR CONSTRUCTION OF RAILROAD—CLAIM OF LIEN.—A lien for materials used in the construction of a railroad must, in general, be claimed and enforced against the entire road, and not merely against that part thereof for which the materials were furnished.

ID.—SUFFICIENCY OF DESCRIPTION—NAME OF ROAD INDICATING PROPOSED TERMINUS—REFERENCE TO "PRESENT" TERMINUS—IMPLICATION.—A claim of lien which stated that the claimant furnished certain materials which were used in the construction "of that certain railway known as and called the Sierra Valleys and Mohawk Railway" (Mohawk valley, in Plumas county, being its proposed westerly terminus), includes the entire railway by general description. A further particular description of the road as commencing at its easterly starting point and continuing through points specified "to its present westerly terminus," particularly described, which was twelve miles short of its proposed westerly terminus, is not inconsistent with the general description, but implies that the road was projected westerly beyond the described terminus, and the claim includes the then incompleted westerly extension of the railroad.

ID.—RECORD OF CLAIM—RAILROAD LYING IN TWO COUNTIES.—The statute does not require the claim of a lien to be recorded in each county in which the railroad is situated; and, where it lies in two counties, the claim of lien may be recorded in either county.

ID.—VOID CONTRACTS—STATEMENT IN CLAIM—VALUE OF MATERIALS—CONTRACT PRICE.—Where the contract for the construction of an extension of the railroad was void for want of record, the claim of lien may properly state the contract price for the materials, and such statement is a sufficient showing *prima facie* of their value.

ID.—PLEADING—ALLEGATION OF VALUE—CERTAINTY.—The complaint for foreclosure of the claim of lien sufficiently alleges the value of the materials by alleging the contract price at which they are furnished in the absence of a demurrer for uncertainty.

ID.—PROOF OF VALUE—ADMISSION OF ANSWER.—Where the averment of the complaint as to the contract price for the materials was neither specially demurred to nor denied by the answer, the value of the materials need not be proved at the trial.

APPEAL from a judgment of the Superior Court of Plumas County. Stanley A. Smith, Judge, presiding.

The facts are stated in the opinion of the court.

G. G. Clough, for Appellant.

Goodwin & Webb, for Respondents.

THE COURT.—One H. C. Bowen was the owner of certain narrow gauge railway property called the Sierra Valleys and Mohawk Railroad, which in different parts of the line was in various stages of advancement; the section on which rails had been laid began at the eastern terminus of the line, a place called Junction in Lassen county, and extended thence northwest and westerly a distance of fourteen miles; the roadbed had been graded something more than sixteen miles beyond the end of the laid track, and the right of way for the road had been obtained a few miles yet farther to the westerly terminus at Mohawk valley in Plumas county; the total distance from said Junction to Mohawk valley being about thirty-five miles. In October, 1894, the defendant H. L. W. Knox agreed in writing with said Bowen to construct additional track on said line, commencing at the end of the fourteen miles already laid and proceeding westward about nine miles to Rock Quarry, a point a few hundred feet west of a place called Kerby Mill. This contract was not, nor was any memorandum thereof, filed in the office of the recorder of either of said counties; so that it was void under the provisions of section 1183 of the Code of Civil Procedure. Nevertheless, Knox proceeded thereunder, and completed his work in accordance therewith on August 8, 1895. The plaintiff in this action, M. C. Bringham, furnished seventeen thousand timber ties to said Knox for use, and which Knox did use, in the construction of said extension of the track to Rock

Quarry; Knox agreed to pay plaintiff eighteen cents apiece for said ties, and yet owes him on account thereof a balance of eighteen hundred and fifty-five dollars. On September 6, 1895, plaintiff filed in the office of the recorder of Plumas county his claim of lien, presently to be described, for the amount of said balance. This is an action to recover said amount and enforce such lien. The court below rendered judgment against Knox—who had made default—for the money due plaintiff, but refused to enforce the asserted lien; from the judgment in favor of the defendants other than Knox plaintiff has appealed.

1. Respondents contend that plaintiff has sought to enforce his lien against a part of a continuous railroad, whereas the law required him to proceed against the whole property; and this is the question mainly discussed by counsel. Pending performance of Knox's contract with Bowen, and before plaintiff filed his claim of lien, the title to the entire line of track, roadbed, and rights of way, from Junction to Mohawk valley, had passed from said Bowen to the defendant Sierra Valleys Railway Company. In his claim of lien filed as aforesaid on September 6, 1895, Bringham stated that he "furnished materials actually used in the construction of that certain railway known as and called the Sierra Valleys and Mohawk Railway, and also such other property than the railroad as may be necessary for the operation and use of said railroad, which railroad is described as follows, to wit," setting out a particular description, commencing at Junction and continuing to the town of Beckwith, from which point it is stated that the road "bears about due west to Kerby Mill, and to its present westerly terminus distant about nine hundred feet from Kerby Mill. That the entire distance from the point called Junction to the present westerly terminus of said Sierra Valleys and Mohawk Railroad is about twenty-three and one-half miles. . . . That not less than twenty-five feet of ground on each side of said railroad, as constructed, is necessary for the use and operation of said road, together with the ground on which all freight and other houses are situated." The instrument concluded with a statement that Bringham claims the benefit of the law relative to liens of mechanics and others upon real property.

At the time the claim was filed work was in progress for the completion of the track on a section of the road extending seven miles west from Rock Quarry, and the same was completed on November 15, 1895, since which time the Sierra Valleys Railway Company has operated the same as part of the continuous line westward from Junction. The allegations of the complaint in the action, considered together, show that plaintiff proceeds for the foreclosure of his lien upon whatever property is described in the said claim.

It seems to be well settled that the proper construction of the statute allowing to materialmen and others a lien for materials or labor furnished for use in the construction of a railroad (Code Civ. Proc., sec. 1183) requires that the lien must, in general, be claimed and enforced against the entire road. (*Cox v. Railroad Co.*, 44 Cal. 18; Boissot on Mechanics' Liens, sec. 190, and cases cited.) In our opinion, the plaintiff here has brought his case within the rule; he distinctly stated in his filed claim that he furnished materials used in the construction—not of a part or section of the railroad—but “of that certain railway known as and called the Sierra Valleys and Mohawk Railway”; it is true, he further says that the said railroad is described as commencing at Junction and continuing to its present westerly terminus about nine hundred feet from Kerby Mill; but it is to be noted that he says its present westerly terminus is at that point, carrying the implication that the railroad was projected beyond such point, and might be extended; the terminus of the road as an actual railroad—a way for traffic—was at the place stated in his claim; work was then in progress for its extension, and in the course of a few weeks the terminus was shifted seven miles farther westward. In view of the statement that the materials were actually used in the construction of a certain railway correctly described by name, it is a fair inference that the further particulars given in the claim of lien were intended by the claimant, and should be regarded merely as particulars for the identification of the road as an entirety and not as exclusive of the westward extension then incomplete; such extension, although not within the descriptive particulars, yet was not excluded by them, and was within the descriptive designation “Sierra Valleys and Mohawk Railway.” The state-

ment that twenty-five feet of ground" on each side of said railroad as constructed is necessary for the use and operation of the road" applies as well to future construction as to the part then complete; no ground on each side could become necessary for operation of the railroad except as the same should be put in condition to be operated. The demand with which the claim of lien concluded—that the claimant have the benefit of the law allowing the lien, was equivalent to a statement that he claimed a lien on the property he had described (*Russ etc. Co. v. Garrettson*, 87 Cal. 589); and for the reasons indicated we think it would be hypercriticism to say that he described less than the whole line for the purposes of his lien. (See *Tredinnick v. Mining Co.*, 72 Cal. 78; *Willamette etc Co. v. Kremer*, 94 Cal. 205.)

2. Respondents also object that since the road lies in the two counties of Plumas and Lassen the claim of lien was void because filed in the office of the recorder of Plumas county only. As to this it is sufficient to say that the statute requires the party claiming the lien to file his claim "for record with the county recorder of the county in which such property, or some part thereof, is situated." (Code Civ. Proc., sec. 1187.) The courts have no power to amend the statute by requiring the filing of the lien in every county where any part of the property it situated.

3. It is urged that since the contract between Knox and Bowen was void, and since that reason the plaintiff could claim his lien only for the value of the materials furnished by him and not for the contract price agreed on with Knox (Code Civ. Proc., sec. 1183), therefore both the claim of lien and the complaint are insufficient in failing to allege the value of plaintiff's materials. It was, however, stated in the claim that the agreed price was eighteen cents apiece for the ties; this statement was a sufficient showing, *prima facie*, of their value. (*Jewell v. McKay*, 82 Cal. 144, 150; *Booth v. Pendola*, 88 Cal. *Joost v. Sullivan*, 111 Cal. 286, 296.) And so in relation to the complaint; it contained no direct averment of the value of the ties, but it was alleged that plaintiff furnished them to Knox at the said agreed price. Since the agreed price was *prima facie* evidence of their value, it must be held that the pleader in this manner alleged the value;

although he averred evidence of the fact rather than the ultimate fact itself, yet as the complaint was not demurred to for uncertainty in this particular it is sufficient on appeal. (*Russ etc. Co. v. Garrettson*, *supra*; *Amestoy v. Electric etc Co.*, 95 Cal. 311; *Mullally v. Townsend*, 119 Cal. 52, and cases cited.) It is said further that the value of the materials was not proved at the trial; but the said averments of the complaint were not denied by the answer of respondents; it was unnecessary, therefore, that plaintiff should make proof of them.

The judgment is reversed and the cause remanded for a new trial.

[Sac. No. 483. Department Two.—November 24, 1899.]

CHARLES SIMON et al., Appelants, v. JUSTICE'S COURT
OF CITY OF STOCKTON, C. P. RENDON, Justice,
Respondent.

JUSTICE'S COURT—JURISDICTION—VACATING JUDGMENT BY DEFAULT—

ANSWER SENT BY MAIL—FILING—ORDER NUNC PRO TUNC.—A justice's court has no jurisdiction to interfere with its judgments except in the manner provided by law; and it has no power, more than ten days after the entry of a judgment by default, to vacate it upon the ground of mistake, surprise, or excusable neglect of the defendant; nor has it jurisdiction, upon a motion of the defendant, made more than forty days after the judgment, to hear and determine issues of law and fact as to whether, after service of summons upon the defendant in another county, an answer addressed to the justice and sent by mail, and received by the constable, in the absence of the justice, had been filed prior to the default, or to order such answer filed *nunc pro tunc*.

ID.—ORDERS WITHOUT JURISDICTION—CERTIORARI.—Orders of the justice's court declaring void the judgment by default, and staying execution thereon, and ordering the answer sent by mail to be filed *nunc pro tunc*, as of a date prior to the judgment, made more than forty days after its rendition, are without jurisdiction, and should be annulled upon *certiorari*.

APPEAL from a judgment of the Superior Court of San Joaquin County. Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

Max Grimm, for Appellants.

H. W. Hutton, for Respondents

McFARLAND, J.—This is an appeal from a judgment of the superior court in a proceeding in *certiorari* in which the petitioners therein, Simon and Busch, sought to have certain orders of a justice's court annulled.

The petitioners commenced an action in a justice's court of the city of Stockton, of which C. P. Rendon was the justice, against one Sparks, who was served with summons in San Francisco, and had until the thirty-first day of August, 1897, to appear. On the first day of September, 1897, it appearing that no answer had been filed by Sparks and no appearance made by him in any way, default was entered against him by A. C. Parker, a justic of the peace who was then holding court for said Justice Rendon, in the absence of the latter; and, as the suit was for damages for an unlawful act, witnesses were examined and evidence received on the part of plaintiff, and judgment was rendered on said September 1st against Sparks for eighty-five dollars and some costs. Nothing further appears to have occurred in the case until the thirteenth day of October, 1897, which was more than forty days after the rendition of the judgment. On that day the attorney for Sparks filed an affidavit in the justice's court, in which he stated that on August 28th he prepared an answer for Sparks and put it into the United States mail on that day addressed to the said Justice Rendon at Stockton, with a letter saying that he was about to take a trip east and would not be back until October, and asking that the cause be set for about the 10th or 11th of that month; that he also on said day addressed to the attorney for the plaintiffs in said suit, at his residence in Stockton, a letter inclosing a copy of the answer, in which he also stated his anticipated absence and asked that the case be not set until about the 11th of October; that he heard no more of the matter until the 4th of October, 1897, when he received a letter from the attorney for the plaintiffs notifying him of the judgment which had been rendered on September 1st and asking him to have amount thereof forwarded to him; and that Justice Rendon had left the state on the 24th of August, 1897, and did not

return until the 5th of September, and that in the meantime Parker had held court for him, and that one Carroll, who was constable, had indorsed on the envelope containing the answer that it had been received at the office of the said justice on the thirty-first day of August, 1897. Some other facts not necessary to be noticed were stated in the affidavit, and it concluded with the prayer that the court would "stay the said judgment and declare the same void and of no effect, and will refuse to issue process thereon, and recall all process and other proceedings taken upon said void judgment." This affidavit was filed October 13 1897, and on the same day notice was given of a motion for orders staying the judgment, declaring it void, staying further execution, etc. These motions were heard on the sixteenth day of October, 1897, on which day the court granted the motion to stay judgment herein, declaring the judgment void, and ordering that the answer of Sparks "be indorsed filed *nunc pro tunc* as of the thirty-first day of August, 1897," and made an order fixing a future day for the trial of the cause. The affidavit of Justice Parker was also filed in which he stated that on the 31st of August, at the request of plaintiff's attorney, he made a careful search among the papers which had been filed in the office of Justice Rendon and among the papers filed in said action, and searched for a letter in which an answer might have been inclosed and also in the private room of said Rendon which adjoins the courtroom, and could not find any answer or other paper filed by the defendant Sparks; that he repeated the search on the morning of September 1st and before the hearing of the evidence in the action or the rendering of a judgment, but was unable to find any answer or other paper showing the appearance of Sparks; that after testimony had been taken and judgment rendered one Carroll delivered to him an open envelope addressed to Justice Rendon, in which was found the letter and answer referred to in the said affidavit of the attorney for Sparks; that he did not know whether Carroll took the envelope from his pocket or from a private desk of Carroll in the private office of Rendon; and that "said Carroll was not a clerk of either the justice of the peace of the city of Stockton, or a clerk of the justice of the peace of Stockton township, and not the proper cus-

todian of any pleading or record of said court or action, and had no authority whatever to file, or receive for filing, any paper in said action." The judgment rendered in the said case of the petitioners against Sparks was not void on its face, but was apparently in all respects a regular and valid judgment.

Upon the foregoing facts, we think that the orders above referred to made by the justice of the peace after the rendition of the said judgment were beyond the jurisdiction of the justice to make, and that the superior court erred in confirming the same. A justice's court cannot disturb or in any way interfere with its judgments except in the manner provided by statute. In *Winter v. Fitzpatrick*, 35 Cal. 269, the court said: "In making the order of the 10th of February, vacating and setting aside the judgment of the 24th of January, the justice of the peace acted without jurisdiction. Inferior courts cannot go beyond the authority conferred upon them by the statute under which they act. They can assume no power by implication, but must keep within the power expressly given. Neither the practice act nor the statute in relation to justices' courts in the city and county of San Francisco authorizes a review by the justice of his own judgment, except upon motion for a new trial." (At that time a justice of the peace was expressly given power to entertain a motion for a new trial by section 622 of the practice act.) The rule thus declared has never been since questioned, and has been frequently reaffirmed. And, so far as the question here involved is concerned, the provisions of the Code of Civil Procedure are the same as those of the old practice act. (See *Weimmer v. Sutherland*, 74 Cal. 341; *Jones v. Justice's Court*, 97 Cal. 523, and cases there cited.) If the motion made in the justice's court to set aside the judgment was based upon the "mistake, inadvertance, surprise, or excusable neglect" of Sparks himself, then the court had no jurisdiction over it because it was not made within ten days after the judgment (Code Civ. Proc., sec. 859; *Weimmer v. Sutherland*, *supra*); if it was based upon the theory that the answer had been filed on the 31st of August, then it raised very serious issues of both law and fact which the justice's court had no jurisdiction to hear and determine on such a motion.

Whether or not the judgment could be set aside by a court of equity on a bill framed for that purpose is a question not now before us. We think that the orders reviewed on the writ should have been vacated by the superior court.

The judgment appealed from is reversed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 2085. In Bank.—November 24, 1899.]

WILLIAM BIRCH, Appellant, v. **JAMES D PHELAN et al.**, Respondents.

FEEs OF JURORS IN CRIMINAL CASES—SAN FRANCISCO—CONSTRUCTION OF STATUTE.—A person who has served as a juror in criminal causes prosecuted in the superior court of the city and county of San Francisco, is not entitled to payment for such services out of the municipal treasury. Neither the act of March 5, 1870, nor the act of February 27, 1866, nor the consolidation act (Stats. 1856, p. 145), nor the act of March 28, 1895, confers any right to such payment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion.

Louis P. Boardman, for Appellant.

Franklin K. Lane, City and County Attorney, and George W. Lane, Assistant, for Respondent.

BRITT, C.—The defendant Phelan is the mayor of the city and county of San Francisco, and, in virtue of his office, is president of the board of supervisors of said city and county; the other defendants are members of said board. The plaintiff served as a juror at various times—eleven days in all—during the month of March, 1899, upon the trial of sundry criminal causes prosecuted in the superior court of said city and county; he presented to the said board a claim in the sum of twenty-two dollars for his services as such juror, and demanded that the same be allowed as a valid

claim payable out of the municipal treasury; defendants having refused, plaintiff petitioned the superior court for a writ of *mandamus* to compel them to allow his claim; the court denied his writ, hence this appeal.

In most of the counties of the state express provision has been made by the legislature for compensation of jurors in criminal cases from the public county funds. (Act March 5, 1870, sec. 28; Stats. 1869-70, p. 176; amended March 1, 1872, Stats. 1871-72, p. 188; *Jacobs v. Elliott*, 104 Cal. 320.) But by section 52 of said act of 1870 the city and county of San Francisco was exempted from the operation of said section 28 thereof; plaintiff urges, however, that certain other statutes "indicate a positive legislative intent that such fees should be paid"—referring to the fees of all jurors in like situation with himself, said to be about fifteen hundred in number. The first of the statutes thus relied on is the act of February 27, 1866, "Concerning fees of all jurors in like situation with himself, said to be about fifteen hundred in number. The first of the statutes thus relied on is the act of February 27, 1866, "Concerning fees of jurors and witnesses in the city and county of San Francisco" (Stats. 1865-66, p. 122), which proceeds as follows: "Section 1. In the city and county of San Francisco the fees of jurors and witnesses shall be as hereinafter provided. Sec. 2. The fees of jurors shall be for each cause—and if a cause occupy more than a day, then for each day's attendance—two dollars....to be paid in civil cases by the party in whose favor verdict is rendered before the same may be recovered as costs against the party losing the case....Until they are paid no further proceedings shall be allowed in the action. No person shall receive fees for serving on a coroner's jury." Section 3 relates to the fees of witnesses in civil suits only.

The court, per Mr. Justice Harrison, said in a recent case: "The right of compensation for services as a juror is purely statutory, and it is for the legislature to determine in what cases such compensation shall be made, as well as the amount and mode of payment; or it may withhold any compensation therefor." (*Hilton v. Curry*, 124 Cal. 84.) Comparing and considering together the several parts of said act of 1866, there seems to be in it no intelligible provision for the compensation of jurors in criminal cases; if, however, we could admit that such was the legislative intent and that language

has been employed from which the intent appears, the statute yet fails to support the plaintiff's case for the reason that it does not indicate a purpose to charge such compensation upon the city and county. The charter of the city and county the consolidation act (Stats. 1856, p. 145)—provides that the municipal funds may be used to pay the fees of jurors in criminal cases "when the same by law are payable out of the county treasury"; and forbids such payment from that source unless required "by law," which it defines to be "the constitution and laws made or adopted by the legislature in pursuance thereof." (Stats. 1856, secs. 82, 83, 95.) Obviously, there is nothing in the act of 1866 declaring or intimating that such fees are payable out of the local treasury, and we have no more warrant to say that the charge arises by implication against the city and county than to say that it is implied against the state of California—perhaps not even as much. (See *County of Modoc v. Spencer*, 103 Cal. 498, 500.)

The other statute, which, in the view of plaintiff, affords foundation for his demand, is the act of March 28, 1895, "To establish the fees of county, township, and other officers, and of jurors and witnesses in this state." (Stats. 1895, p. 267.) It is unnecessary to set out its provisions touching jurors' fees; the interpretation thereof is affected by considerations quite similar to those already stated in reference to the act of 1866; this court has held—in *Hilton v. Curry*, above cited—that the purpose of the act of 1895, as regards the fees of jurors, is but to establish the amount of the same, and that it does not fix the source of payment, nor authorize payment out of the public treasury. The ruling in that case related to fees of jurors in civil causes, but we see nothing in the statute which would allow a different conclusion upon its effect in the present instance. The claim of plaintiff cannot be supported, and the judgment of the court below should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment of the court is affirmed.

Van Dyke, J.,	Harrison, J.,
McFarland, J.,	Garoutte, J.
Temple, J.,	Henshaw, J.

[S. F. No. 1793. Department One.—November 24, 1899.]

C. BARTHE, Respondent, v. JOSEPHINE ROGERS, Administratrix, etc., Appellant.

ESTATES OF DECEASED PERSONS—CLAIMS—ACTION UPON REJECTED CLAIM—VARIANCE.—No action can be maintained upon a claim against the estate of a deceased person which has not first been presented for allowance, and no recovery can be had in an action upon a rejected claim, upon any cause of action not included in the claim. In an action upon a claim for specified services and specific compensation therefor, a recovery at the rate of thirty dollars per month for two years, is a variance which has no foundation in the claim presented, and cannot be supported.

ID.—BURDEN OF PROOF—FAILURE OF EVIDENCE—NONSUIT NOT REQUIRED.—The burden of proof is upon the plaintiff in an action upon a rejected claim to establish that claim. If the evidence of the plaintiff fails to establish the claim sued upon, owing to his misfortune in not being competent to testify in his own behalf, the obligation of the administrator is not thereby varied; nor is the administrator bound to move for a nonsuit, but he may submit the case upon the plaintiff's testimony, and ask for a judgment upon the merits.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

John H. Durst, for Appellant.

A. Ruef, for Respondent.

HARRISON, J.—The plaintiff presented a claim to the defendant against the estate of her intestate, which was rejected by her, and thereupon brought the present action to establish the same. Judgment was rendered in his favor, and the defendant has appealed.

The claim presented by the plaintiff was for services of divers kinds rendered the deceased at different times from October, 1893, to the date of her death, March 29, 1897, and expenses incurred therein, and was made up of fourteen

separate items, to each of which a specific value was fixed, amounting in the aggregate to seven hundred and seventy-eight dollars. In the complaint herein the plaintiff sets forth a copy of the claim so presented by him, and seeks to recover upon an indebtedness of seven hundred and seventy-eight dollars for services rendered the deceased at her request within two years before her death, and for money laid out and expended at her request. At the trial he disclaimed all right of recovery for any services except such as were rendered within two years prior to the death of the intestate, and the court allowed him thirty dollars a month for that period, and found that the decedent was indebted to him in the sum of seven hundred and twenty dollars "for services rendered to her by plaintiff within two years prior to her said death at her request," and entered judgment accordingly. The appeal herein is maintained upon the ground that the evidence is insufficient to sustain this finding of the court and that the judgment was rendered upon a different cause of action from that stated in the claim which was presented to the defendant.

Of the fourteen items of which the plaintiff made up the claim which he presented to the defendant, seven were for "expenses and services" in making trips from San Francisco to various parts of the state at request of deceased, for which one hundred and fifty-eight dollars was claimed; and one item of twelve dollars was claimed for "accompanying Mrs. Marshall six trips to Berkeley and San Leandro." There is no evidence in the record that the plaintiff ever made a trip in behalf of the deceased to any part of the state, and the only evidence in support of his claim for "accompanying" her to any place outside of San Francisco is that given by the witness Danier, who testified: "I knew that Barthe went different places in the country with her." Another item in the claim as presented is for fifty dollars for "expenses and services about fifty trips to office of A. Ruef, attorney, and consultation with him on behalf of deceased with her." The only evidence bearing on this item is that given by Mrs. Stencil, who testified that the deceased told her that Barthe took her once to some lawyer. One of the items in the claim presented is for two hundred dollars for "services

rendered to deceased four or five times per week from October, 1893, to April, 1895." As she died March 29, 1897, the plaintiff could recover for only such services under this item as were rendered during the last two days in March, 1895. Another item in the claim as presented was fifty dollars for "expenses and services in attending to various negotiations relating to sale of her real property, at her request." There is no evidence in the record tending to show that any such services were rendered.

The provision in section 1500 of the Code of Civil Procedure that the holder of a claim against the estate of a deceased person cannot maintain an action thereon unless the claim is first presented to the executor or administrator, is equivalent to a declaration that he cannot maintain an action upon any claim that he has not first presented for allowance, and that in any action to establish the validity of a claim which has been presented and rejected "he can recover only upon the claim which has been so presented and rejected, and is not entitled in that action to recover against the estate for any other cause of action." (*Lichtenberg v. McGlynn*, 105 Cal. 45.) In the present case, the plaintiff's claim as presented to the administratrix was for certain specified services, for which he demanded certain specific compensation. At the trial he offered evidence in support of only a portion of these services, and offered no evidence of the particular value of such services. In the claim which he presented his demand for compensation for those services of which he offered evidence was less than one-half of the amount for which the court gave him judgment, and the basis of computation upon which the court rendered its decision, viz., "thirty dollars a month for two years," had no foundation in the claim as presented. It may be added that the evidence of services rendered by him to the decedent within two years of her death does not equal the extent of services stated by him in his claim.

The contention of the respondent that the defendant should have moved for a nonsuit, rather than submit the case upon the plaintiff's testimony, is without merit. The plaintiff was not entitled to recover unless he produced evidence in support of his claim, and the burden was upon him to establish the claim which had been rejected. If his evi-

dence failed in this respect the defendant was entitled to ask for a judgment in her behalf. As was said in *Lichtenberg v. McGlynn*, *supra*: "It may be that the failure to make greater proof results from the statutory inability of the plaintiff to testify in his own behalf, but this does not relieve him from the necessity of producing sufficient evidence to establish his cause of action. His incompetency to testify may be his misfortune, but the defendant's obligation is not thereby varied, and she is entitled to demand such proof before she can be called upon to pay to the plaintiff the money which is in her hands as trustee for the beneficiaries of her intestate."

The judgment and order denying a new trial are reversed. Garoutte, J., and Van Dyke, J., concurred.

[Sac. No. 670. Department One.—November 24, 1899.]

FRED H. DAY, Respondent, v. S. G. DUNNING, Appellant.

ELECTION—VALIDITY OF BALLOTS—EXCESS OF NAMES VOTED FOR—IDENTIFYING MARK.—Ballots cast for an excessive number of names for one office have only the effect, under section 1211 of the Political Code, to prevent the ballots from being counted for that office; and such excessive number of votes for one office does not constitute an identifying mark within the meaning of section 1215 of the same code, and does not destroy the validity of the ballot, or affect it in so far as properly cast for candidates for other offices.

ID.—CONSTRUCTION OF CODE—EXCEPTIONS AS TO IDENTIFYING MARKS.—The fact that the vote for an excessive number of names for one office might be used as an identifying mark does not affect the validity of the ballot in respect of other offices, such identifying marks being relieved from the operation of section 1215 of the Political Code by virtue of the more specific provision of section 1211 of that code, which is a limitation upon section 1215.

APPEAL from a judgment of the Superior Court of Yuba County. E. A. Davis, Judge.

The facts are stated in the opinion of the court.

W.-H. Carlin, and J. E. Ebert, for Appellant.

W. T. Phipps, for Respondent.

GAROUTTE, J.—This appeal presents an election contest for the office of auditor and recorder of Yuba county. The consideration of a single question disposes of the merits of the litigation.

The trial court rejected thirteen ballots which had been voted for this appellant, upon the ground that they contained a mark which identified them. The face of these ballots disclosed that the voter had marked more names for a certain office than there were persons to be elected to that office, and this act of the voter was held to be a mark of identification. For illustration: in the city and county of San Francisco, eighteen supervisors are elected. If an elector voted for nineteen, the entire ballot should be rejected as containing an identifying mark. This contention of respondent, which was sustained by the trial court, cannot be approved, and a citation of the statutes of this state demonstrates its unsoundness.

Section 1215 of the Political Code, among other matters, declares: "No voter shall place any mark upon his ballot by which it may afterward be identified as the one voted by him." Section 1211 of the same code also declares: "If a voter marks more names than there are persons to be elected to an office . . . his ballot shall not be counted for such office." It may be conceded that a vote for nineteen supervisors, when there are but eighteen to be elected, would be one way of identifying the ballot, but it would no more identify the ballot than if the voter had voted for seventeen supervisors. Yet clearly such action of the voter would not justify a rejection of the ballot. It is thus apparent that any and every mark upon a ballot which might possibly be used as an identification does not necessarily demand that the ballot be rejected; and when we read said section 1211 it is plain that the marks here involved do not come within the prohibition of section 1215. These two sections are not necessarily in conflict. Force and effect may be given to both, and under such conditions force and effect must be given to both. If the marks upon these ballots in any sense may be said to be identifying marks, then they are relieved from the force and effect of section 1215 by virtue of the provisions

of section 1211. Section 1215 is general in its nature, and covers a broad field. Section 1211 is special in its nature, and directed to a single object and purpose. It is essentially a limitation upon section 1215, and must be held controlling.

Section 1211, by all rules of construction, is susceptible of but a single meaning. It means that the ballot must be rejected as to the particular office where more than the number of names allowed by law are voted for that office, and that it must be counted as to all other names for all other offices. This is as plain as though it were declared in direct and positive language. The statute means this, or it means nothing. Any other construction would involve a contradiction, even an absurdity. If these crosses constitute an identifying mark forbidden by the statute, then the ballot could not be counted for any office by virtue of section 1215; and it was idle and absurd legislation to enact section 1211, declaring that such a ballot should not be counted for any person for that *particular office*. Counsel for respondent declares the portion of section 1211 here involved to be inadvertent legislation. The soundness of this claim is not made plain to us, but, however that may be, if there was inadvertent legislation it is inadvertence that may only be effectively cured by the law-making body of the state.

Various cases from other states are cited by both parties to this appeal, which bear upon the question here under consideration. It is unnecessary to review those authorities. Our statute is succinct and controlling, and, tested by its provisions, these thirteen ballots should have been counted for appellant. Respondent was declared elected by a plurality of nine votes. The conclusion arrived at demands a reversal of the judgment.

For the foregoing reasons it is so ordered.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

[L. A. No. 584. In Bank.—November 25, 1899.]

CHARLES W. RICHARDSON, Respondent, v. J. W. F. DISS, as Clerk of the Superior Court, etc., Appellant.

ESTATES OF DECEASED PERSONS—SOLVENT ESTATE—INTEREST ON CLAIM.

An allowed claim against a solvent estate of a deceased person, which is based upon a contract bearing a greater rate of interest than the legal rate, continues to bear the contract rate of interest until its payment. Section 1494 of the Code of Civil Procedure, limiting the rate of interest to that allowed on judgments, applies only to claims against insolvent estates.

ID.—CONSTRUCTION OF CODE—HEADNOTE TO SECTION.—The headnote of section 1494 of the Code of Civil Procedure, to the effect that "claims to be sworn to, and, when allowed, to bear same interest as judgments," cannot be treated as an enactment of law standing by itself, but should be construed in its contextual relation to the whole section of which it is a part.

APPEAL from a judgment of the Superior Court of San Bernardino County. Frank F. Oster, Judge.

This was a proceeding for a writ of mandate to compel the clerk of the superior court of San Bernardino county to pay to the petitioner, who was a creditor of the estate of a deceased person, and whose claim was founded on a promissory note secured by mortgage, the amount of interest due on the note at the rate provided for therein, out of the proceeds of the mortgage property, which had been sold in the probate proceedings. Further facts are stated in the opinion.

J. P. Hight, and Charles L. Allison, for Appellant.

Curtis & Curtis, for Respondent.

GRAY, C.—The record in this case presents the single question: What rate of interest should an allowed claim, based on a promissory note, against a *solvent* estate of a deceased person, bear? On the part of appellant it is contended that the claim after allowance should bear the legal rate of seven per cent, and on the part of respondent it is claimed that the agreement as to interest, contained in the contract upon which the claim is based, is the measure of the rate of

interest as well after the claim is allowed as before. The learned judge of the trial court adopted the latter theory, and decided that the claim after allowance should draw the contract rate of interest, which in this case was fifteen per cent per annum, compounded quarterly. We think this decision correct.

Section 1920 of the Civil Code provides that: "Interest is payable on judgments recovered in the courts of this state at the rate of seven per cent per annum, and no greater rate, but such interest must not be compounded in any manner or form." Section 1494 of the Code of Civil Procedure provides as to estates of deceased persons: "If the estate be insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the superior court."

There is no statutory or code provision cited in the briefs herein fixing any rate of interest on claims against a *solvent* estate, and we infer that no such provision exists. Appellant claims that the headnote to section 1494 of the Code of Civil Procedure, quoted as follows: "Claims to be sworn to, and, when allowed, to bear same interest as judgments," constitutes such provision; but the headnote of a section of the code should not be treated as an enactment of law standing by itself, but should be read and construed in its contextual relation to the whole section of which it is a part. Thus read and construed, it is obvious that the legislature intended by the said section to provide for a rate of interest only as to claims against insolvent estates. Before the enactment of any law reducing the interest on judgments from the contract rate to the legal rate all judgments, based on contracts which provided for interest in excess of the legal rate, continued to draw interest at the rate agreed upon in such contracts. (*Corcoran v. Doll*, 32 Cal. 82.) It would seem also that prior to the adoption of section 1494 of the Code of Civil Procedure, all allowed claims against estates of deceased persons, whether such estates were insolvent or not, bore interest at the contract rate when the contracts upon which they were based provided for a rate of interest in excess of the legal rate. (*Estate of Den*, 35 Cal. 692.) Upon this we argue that, it being necessary to pass statutes to reduce the interest on judgments and on claims against insolvent estates, that

in the absence of any statute directed to the same purpose in reference to claims against solvent estates, such claims must still be held to bear interest, up to the time of their payment, at the contract rate. Indeed, the whole course of legislation on the subject of interest would seem to show that such was the intention of the legislature.

Section 1494 of the Code of Civil Procedure, in specially mentioning insolvent estates as subjects for reduction of interest *ex industria*, excludes all estates not mentioned from the operation of this law reducing interest, and shows as plainly as anything short of positive enactment can show that it was the intention and purpose of the legislature that claims against solvent estates should continue after allowance to draw interest at any rate in excess of the legal rate that the contracts upon which they were based would warrant. Such seems also to be the construction placed upon the law by the bench and bar of the state since the enactment of the code referred to herein, for we find in *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, and in *Finger v. McCaughey*, 114 Cal. 64, that the contracts therein controlled the rate of interest the claims bore after allowance. It is true there is no discussion found in these cases of the question as to what the rate of interest should be. Indeed, all parties and the court seem to have coincided in the same rule of interest adopted by the trial court in the case at bar as being the only rule to be deduced from the code provisions on the subject and therefore requiring no discussion. We have found no decision conflicting with this rule.

For the foregoing reasons we advise that the judgment and order of the court below be affirmed.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Harrison, J., Garoutte, J.,
McFarland, J., Temple, J.,
Henshaw, J.

[Sac. No. 548. Department One.—November 27, 1899.]

A. H. CARPENTER, Appellant, v. W. B. NUTTER et al.,
Respondents.

MALICIOUS PROSECUTION—PLEADING—TERMINATION OF PROSECUTION.—

In an action for malicious prosecution, it must be alleged that the prosecution is at an end, either by alleging that the defendant was acquitted of the charge, or by alleging facts showing the legal termination of the prosecution complained of in favor of the defendant prior to the commencement of the action.

ID.—CHARGE OF FELONY—DISMISSAL BY JUDGE.—In an action for the malicious prosecution of the plaintiff on a charge of felony, a complaint which, after setting out his commitment by a justice of the peace and the filing of an information against him in the superior court of a particular county, merely alleges that he was "released and discharged from custody and the information dismissed by the Hon. Joseph H. Budd, judge of the said superior court," is insufficient to show a legal termination of the prosecution, because the judge, acting as an individual and not in court, could not discharge the plaintiff or dismiss the information, and also because no facts were alleged negating the power of the court to direct another information to be filed against him, under sections 997, 999, and 1387 of the Penal Code.

APPEAL from a judgment of the Superior Court of San Joaquin County. Joseph H. Budd, Judge.

The facts are stated in the opinion.

Carpenter & Flack, for Appellant.

A. H. Ashley, Nicol & Orr, and W. M. Gibson, for Respondents.

COOPER, C.—Action to recover damages for malicious prosecution. A demurrer was interposed to the complaint in the court below and sustained. Judgment was thereupon entered in favor of defendants. This appeal is from the judgment upon the judgment-roll and for the purpose of reviewing the order of the court sustaining the demurrer. The complaint alleges in substance that at all times therein mentioned defendant Nutter was district attorney of San Joaquin county, and that defendant Parker was justice of the peace of

Stockton township in said county. That defendants Langford and De Vries were sureties on the official bond of defendant Nutter as such district attorney. That about the eighteenth day of January, 1898, the defendants Nutter, Weinberg, Parker, and Sapiro entered into a conspiracy to falsely and maliciously charge the plaintiff with the crime of grand larceny, and, in pursuance of such conspiracy, the said defendants last herein named, filed two written complaints in the justice's court of said defendant Parker and with said Parker as justice of the peace. That upon said complaints warrants of arrest were issued and plaintiff was arrested and taken in custody and compelled to give bail to secure his release. That after an examination of witnesses, and upon the advice and at the request of defendant Nutter as district attorney, the defendant Parker, as justice of the peace, held the plaintiff to answer and appear before the superior court of said county upon two charges of grand larceny. That afterward, on the twenty-first day of February, 1896, the defendant Nutter, as district attorney, filed two informations in the superior court of said county charging plaintiff with the crime of grand larceny in each case, said information being based upon the commitments and orders made by said Parker as justice. That in all said matters the defendants Nutter, Weinberg, Parker, and Sapiro acted maliciously and without probable cause. "That subsequently, and on the first day of March, 1898, the plaintiff was released and discharged from custody and said informations dismissed by the Hon. Joseph H. Budd, judge of the said superior court, on the ground that there was no evidence, cause, or probability that a crime had been committed, or that plaintiff was in any way connected with the crime of grand larceny, or any crime."

There is no allegation in any way connecting defendants Langford and De Vries with the alleged malicious prosecution, unless the fact that they are sureties on the bond of the defendant Nutter, as district attorney, so connects them. All the defendants demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The defendant Parker separately demurred to it upon the ground of misjoinder of parties defendant and that several causes of action were improperly united, and upon other

grounds. The demurrer was sustained as to all the defendants, and we think the ruling correct.

In actions for malicious prosecution it must be alleged that the prosecution is at an end, either by alleging that defendant was acquitted of the charge, or by alleging facts showing the legal termination of the prosecution complained of in favor of defendant prior to the commencement of the action. (1 Chitty on Pleading, 680; Newell on Malicious Prosecution, sec. 1, p. 327; *Holliday v. Holliday*, 123 Cal. 31; *Hibbing v. Hyde*, 50 Cal. 206.)

The rule as above stated has always prevailed both in England and in this country. That it is a necessary rule founded upon reason is apparent to the legal mind. Proceedings in courts having jurisdiction of the person and of the subject matter must be shielded from collateral attack. And in all cases where such proceedings have been regularly taken against a party and sustained by the court in which it is pending it is conclusively presumed, when collaterally assailed, to have been regular and valid, although in fact it may have been erroneous. If the rule were otherwise, the judgment of courts would have no efficacy, as they would be subject to impeachment wherever an attempt was made to enforce them and would leave disputes between parties forever unsettled. Therefore, in this case the complaint alleging and showing that the plaintiff was legally examined and held to answer by a justice having jurisdiction of the person and the right to examine into the question as to the probability of his guilt or innocence of the crimes charged against him, and that the district attorney of the county, being the person in whom the law has vested the power and duty of filing informations, has filed such informations in the superior court having proper jurisdiction of the subject matter, it must, in the face of the demurrer, be conclusively presumed that the informations are still pending unless it is made to appear by direct averment or by a statement of facts which show the necessary legal conclusion that the prosecution has finally ended and terminated in favor of plaintiff. There is no allegation that the plaintiff was acquitted of the charges contained in the informations. It might have been alleged that he was discharged by an order of the court in which the prosecutions were pending, but this was not done. It is not even alleged that he was discharged

by any order of any court. The statement is that "he was discharged from custody and the informations dismissed by Hon. Joseph H. Budd, judge of the said superior court." There is no allegation that Joseph H. Budd is or was the judge of the superior court in which the informations were pending, but, even if it were so alleged, the judge, acting as an individual and not in court, could not discharge the plaintiff or dismiss the informations. The powers of a superior judge at chambers are enumerated in the code (Code Civ. Proc., sec. 166), and the authority to discharge a defendant or to dismiss an information is not among them. The general rule is, that all judicial business must be transacted in court, and the authority to transact such business out of court is exceptional and does not exist unless expressly authorized by statute. (*Larco v. Casaneuava*, 30 Cal. 565; *Norwood v. Kenfield*, 34 Cal. 332; *Loomis v. Andrews*, 49 Cal. 240.)

The court may of its own motion order an indictment or an action to be dismissed. (Pen. Code, sec. 1385.)

But in cases of felony such discharge is not a bar to another prosecution. (Pen. Code, secs. 999, 1387.)

The court may also direct another information to be filed. (Pen. Code, sec. 997.) If it had been alleged that the information was dismissed by the court the facts would have to be alleged in such manner as to show that the dismissal was an end of the prosecution. It is an elementary rule that the allegations of a pleading will be most strongly construed against the pleader. In no case can the court, in face of a demurrer, presume any facts to exist except such as are stated in the complaint. If the plaintiff in this case was in fact discharged by an order of the superior court of San Joaquin county, and the order was such as to end and finally determine the prosecutions under the informations, he could have so alleged in his complaint. He has not done so under the law as we understand it. It becomes unnecessary to consider any other questions in the case.

The judgment should be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison, J., Van Dyke, J., Garoutte, J.

Hearing in Bank denied.

[Crim. No. 486. In Bank.—November 28, 1899.]

THE PEOPLE, Respondent, v. JOHN J. VALLIERE, Appellant.

CRIMINAL LAW—EVIDENCE—SEARCH IN CONNECTION WITH DISTINCT CRIME—BURGLARY.—On a trial for burglary in which evidence for the prosecution had been given that a certain revolver, found in the possession of the defendant, was one of the articles alleged to have been stolen, but which the defendant testified was his property and had been in his possession for a long time previous to the alleged crime, it is improper, in rebuttal, to ask a witness for the prosecution, who had found the revolver while searching the person and trunk of the defendant, how he came to make such search, and for the witness to answer that the search was made in connection with another burglary which the defendant was suspected of having committed.

ID.—IMPROPER CONDUCT OF DISTRICT ATTORNEY.—Upon such answer being ruled out, it is error justifying a new trial for the district attorney, in his argument to the jury, to refer to such search as having been made for such other burglary, and that he knew of the same to his own knowledge.

APPEAL from a judgment of the Superior Court of Butte County and from an order refusing a new trial. John C. Gray, Judge.

The facts are stated in the opinion of the court.

George E. Gardner, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

TEMPLE, J.—Defendant, having been convicted of the crime of burglary, appeals from the judgment and from the order denying a new trial.

The crime was committed, if at all, in the dormitory, called a bunkhouse, on the Cosby ranch, in Butte county, on the 15th of November, 1897. Defendant had once been employed on the ranch, and on that day called to see some of the workmen. He complained of illness and went into the bunkhouse ostensibly to rest. The men were in the fields at work. The next day several of them missed various articles

which they had left in the bunkhouse, and defendant was at once suspected of the larceny.

The defendant was arrested on the evening of the following day at Marysville, and certain articles, which were identified by some of the workmen as their property, and which at the time of the alleged burglary were in the bunkhouse, were found in his possession, among others a certain revolver.

Defendant was a witness in his own behalf and testified that the revolver was his property, and had been in his possession for a long time previous to the alleged crime.

In rebuttal, a constable was called, who testified, against objections which were perhaps insufficient, that on the 15th of November he searched the person and trunk of defendant at Chico, because on that morning a number of articles had been taken from rooms in the Hallam House, and he testified that defendant then had no pistol. The evidence was relevant if, as the judge then stated, defendant had testified that the pistol was in his trunk all that day. I have not found that statement in his evidence, but, in any event, it was improper to ask the witness how he came to make the search, knowing, as the district attorney must be presumed to have known, that the answer would disclose the fact that defendant was suspected of having taken articles from the rooms of the Hallam House in Chico.

The objection, at first overruled, was finally sustained, but the answer had been given. The matter was again brought up in the argument. In addressing the jury, among other matters, the prosecuting officer said: "This trunk was not searched for this theft in Chico, but for another theft that I know of to my own knowledge." This statement was in the nature of testimony. It was the assertion of a damaging fact not only not proven, but in regard to matters which had been expressly ruled out. The misconduct was much more flagrant than that in *People v. Bowers*, 79 Cal. 415. Indeed, among the numerous cases discussed in *People v. Wells*, 100 Cal. 459, there is none worse. In my opinion, the examination was inexcusable, and the statements contained in the closing address were an outrage upon justice, which ought not to be allowed to pass. The court promptly rebuked the attorney, but that did not cure the injury. Re-

bukes do not seem to have any effect upon prosecuting officers, and probably as little upon juries. The only way to secure fair trials is to set verdict so procured aside.

The judgment and order are reversed and a new trial awarded.

Harrison, J., Henshaw, J., and Beatty, C. J., concurred.

[S. F. No. 1991. In Bank.—November 28, 1899.]

ISAAC ELDER, Petitioner, v. OTTO GRUNSKY, County Clerk, etc., Respondent.

PRACTICE—DEFAULT—SERVICE OF SUMMONS—RETURN.—After a service of summons has been set aside and vacated, and so long as the order therefor remains in force, the county clerk has no authority, and cannot be compelled by *mandamus* to enter the default of the defendant for failure to answer upon the return of such vacated service.

ID.—FOREIGN AND DOMESTIC CORPORATIONS—INSUFFICIENT RETURN.—Where an action is brought against a corporation, alleged in the complaint to be organized under the laws of the state of California, and the return of the service of summons, which recites that the defendant is a foreign corporation, is insufficient to show a valid service upon a domestic corporation, the county clerk is justified in refusing to enter the default of the defendant for failure to answer.

APPLICATION for a writ of mandate.

The facts are stated in the opinion of the court.

J. B. Webster, and D. E. Alexander, for Petitioner.

Dudley & Buck, and George F. Buck, for Respondent.

HARRISON, J.—Application for writ of mandate. The petitioner commenced an action in the superior court for the county of San Joaquin May 27, 1899, against the Southern Pacific Company, alleging in his complaint that the defendant was at the date of the complaint, and at all the times therein mentioned, "a corporation incorporated, organized and doing business in this state." A summons was issued upon

the complaint on the same day, and on the 9th of June was returned to the clerk's office with an affidavit of M. Haynes indorsed thereon that he "personally served the within summons on the twenty-ninth day of May, A. D. 1889, on C. J. Jones, the managing and business agent at Stockton, California, of the defendant therein named, by personally delivering to said C. J. Jones personally in said county of San Joaquin a copy of said summons attached to a copy of the complaint in the action therein mentioned; that said defendant is a foreign corporation doing business in the state of California." The respondent herein is the county clerk of San Joaquin county, and the clerk of said superior court, and on June 9th, after the return of the summons, the plaintiff demanded of him that he enter the default of the defendant in said action, which demand was refused. On the 6th of June the defendant in the action had given notice to the plaintiff therein—petitioner herein—of a motion to set aside the service of said summons, and the court had made an order fixing June 8th as the time for hearing this motion, and on that day this notice, with the admission by the plaintiff of its service, together with certain affidavits offered on behalf of the plaintiff in answer to the motion, were filed with the clerk, and the hearing of the motion was continued until June 12th. On this last day, the court made an order granting the defendant's motion to set aside and vacate the service of the summons. Thereafter the plaintiff made the present application to this court for a writ of mandate directing the respondent to enter the default of the defendant in said action.

A writ of mandate to an officer will issue to compel the performance of an act which the law specially enjoins as a duty resulting from his office, trust, or station. The county clerk is not authorized to enter the default of a defendant unless proof has been made and filed that such defendant has been served with the summons, together with a copy of the complaint in the manner provided by the code. Section 411 of the Code of Civil Procedure prescribes different modes of service according to the character of the defendant to be served; and a service that would be good upon a defendant belonging to one of the classes designated in that section would not be good as to a defendant belonging to another of those classes, or authorize the entry of a default as to such defendant. In

the present case, the clerk was called upon to determine whether the defendant was a domestic or a foreign corporation, and he may well have hesitated to enter the default of the defendant upon the proof of service presented to him. The plaintiff had alleged in his complaint that the defendant was incorporated under the laws of this state, and the clerk was not authorized to disregard this allegation by reason merely of the affidavit of the process server that the defendant was a foreign corporation. If the defendant was, as alleged in the complaint, a domestic corporation, the proof of service was insufficient to authorize its default to be entered. But, irrespective of this, at the time the present application was made for the writ of mandate, there was no obligation upon the clerk to enter such default. The superior court had by its order set aside and vacated the service of the summons, and so long as that order remained in force the clerk had no authority to enter a default against the defendant. The court had by its order declared that the very evidence of service upon which the plaintiff claimed the right to a default was insufficient to establish such service, and the clerk was required to observe and obey this order, as it was a part of the court's proceedings in the action. It was within the jurisdiction of the court to make the order, and when made, whether erroneous or not, so long as it was in force, it was binding upon the clerk as well as upon the parties to the action. Neither can the action of the court in setting aside the service be reviewed in this proceeding.

The application for the writ is denied.

Henshaw, J., Van Dyke, J., Garoutte, J., and McFarland, J., concurred.

[S. F. No. 2073. Department Two.—November 29, 1899.]

HIBERNIA SAVINGS AND LOAN SOCIETY, Respondent, v. A. C. FREESE, Administrator, etc., et al., Defendants. MARGARET J. BULLARD, Appellant.

APPEAL—DISMISSAL—UNDERTAKING REFERRING TO PRIOR APPEAL—FILING AFTER SECOND APPEAL.—An undertaking on appeal executed after the filing of a first notice of appeal, and prior to the filing of a second notice, which recites that the appellant has appealed, and that the sureties undertake in consideration of such appeal, refers only to the first appeal, and limits the liability of the sureties thereto. The fact that the undertaking was filed by the appellant's attorney subsequently to the second appeal does not constitute it an undertaking thereupon; and the second appeal must be dismissed for want of an undertaking.

ID.—DEFINITENESS OF UNDERTAKING.—A valid undertaking on appeal must refer with definiteness to the particular appeal to which it is intended to relate, and, if it fails to do so, it is insufficient. An undertaking definitely referring to a pending appeal when executed cannot be wrested from its natural language, so as to refer to a subsequent appeal, because filed thereafter.

ID.—EFFECTIVENESS OF UNDERTAKING—FILING—AUTHORITY OF ATTORNEY—LIMITED AGENCY FOR SURETIES.—Although an undertaking on appeal does not become effective until the date of filing, its validity has reference only to the appeal to which it refers; and, although the attorney for the appellant is the agent of the sureties for the purpose of filing the undertaking, his agency is limited to the filing of it in the particular appeal to which it has reference.

MOTION to dismiss an appeal from an order of the Superior Court of the City and County of San Francisco refusing to stay execution of a writ of assistance. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

George D. Collins, for Appellant.

Tobin & Tobin, for Respondent.

HENSHAW, J.—This is a motion to dismiss appellant's appeal, which grows out of the following facts: Appellant's notice of appeal from an order of court made and given on the thirteenth day of March, 1899, was served and filed on the fifteenth day of March, 1899. On the fifth day thereafter—that is, on the twentieth day of March, 1899—the appel-

lant procured to be executed an undertaking upon appeal reciting that, whereas Margaret J. Bullard has appealed to the supreme court, etc., that in consideration of the premises and of such appeal, etc. This undertaking bore date the twentieth day of March, 1899, and the jurat of the notary thereon is of the same date. On the twenty-first day of March, 1899, appellant's attorney served and filed a second notice of appeal, and on the following day, March 22, 1899, this undertaking was filed. The first appeal had lapsed for failure to file the undertaking within the statutory period, and this motion to dismiss is directed against the second appeal upon the ground that no undertaking thereon had been filed. To this appellant makes answer that until the filing of the undertaking it has no force, effect, or validity, and that when filed it is an undertaking in reference to the condition of things at that time existing; therefore, that this particular undertaking filed upon March 22d must be construed to have reference to and to be an undertaking upon the appeal, notice of which was given upon March 21st. But we think this position untenable. It is required of a valid undertaking upon appeal that it shall refer with definiteness to the particular appeal to which it relates, and, if it fails so to do, it is ambiguous and insufficient. (*Sharon v. Sharon*, 67 Cal. 185; *Home etc. Co. v. Wilkins*, 71 Cal. 626; *Pignaz v. Burnett*, 121 Cal. 292.) At the time when the sureties upon this undertaking entered into it but one appeal had been attempted, but one notice of appeal had been given, and the undertaking clearly and distinctly refers to that. It is the right of the surety to stand upon the strict letter of his undertaking. He can be held to no different contract from that into which he has entered. In this case the undertaking of the sureties was to stand responsible for damages and costs which might follow the prosecution of a particular appeal clearly referred to in their undertaking. By the construction which appellant seeks the undertaking would be wrested from its natural language and held to apply, not to that appeal which was subsisting at the time the contract was entered into, but to another appeal, no step in which had been taken at the time the sureties executed their bond. It is true, as appellant says, that the attorney became the agent of the sureties for the purpose of filing the undertaking, and that it takes validity and

effect from the date of the filing. But the agency of the attorney was to file the undertaking in the particular appeal to which it made reference, and the validity which the undertaking has as the date of its filing is a validity in reference only to the particular appeal in question.

We conclude, therefore, that there has been no undertaking as required by law filed after the notice of appeal of March 21st, and that this motion to dismiss should be granted.

It is ordered accordingly.

McFarland, J., and Beatty, C. J., concurred.

[Sac. No. 691. Department One.—November 29, 1899.]

CHARLES M. WELCH, Administrator, etc., Respondent, v.
R. C. SARGENT et al., Appellants. STOCKTON COM-
BINED HARVESTER AND AGRICULTURAL
WORKS et al., Defendants and Respondents. STOCK-
TON SAVINGS AND LOAN SOCIETY et al., Inter-
venors and Respondents.

**CORPORATIONS—INSOLVENCY—TRANSFER OF STOCK—LIABILITY FOR UN-
PAID SUBSCRIPTIONS—CREDITORS' BILL.**—In general, the law
places no restriction upon the right of a stockholder to transfer
his stock, so long as the corporation is solvent. But, after the
corporation has become insolvent to the knowledge of the stock-
holder, he cannot, by a transfer of his stock to an irresponsible
person, escape liability for an unpaid subscription to stock, as
against a creditors' bill to enforce such liability filed by the cred-
itors of the insolvent corporation, who are entitled to have all such
transfers canceled, and to have judgment entered against the
transferers.

**ID.—FORMER JUDGMENT IN FAVOR OF CORPORATION—DEFENSE ADJUDI-
CATED.**—A former judgment rendered in favor of the corporation,
enforcing an unpaid installment and adjudging a defense pleaded
thereto insufficient, is conclusive against the validity of the same
defense when pleaded against the enforcement of other unpaid in-
stallments upon a creditor's bill to reach the assets of the insolvent
corporation.

ID.—SEVERAL JUDGMENTS IN FAVOR OF CREDITORS.—The creditors ap-
pearing in the action, whether as plaintiffs or as intervenors, are
entitled to have several judgments against each stockholder made
a party to the action, to the extent of his indebtedness to the
corporation.

- ID.—ISSUE AS TO RELEASE BY ONE CREDITOR—OMISSIONS IN FINDINGS RENDERED IMMATERIAL.**—Where the judgments rendered against a stockholder exceeded the amount due from him to the corporation, he is not prejudiced by an omission to find and to render judgment as to the amount due to another creditor holding collaterals of indeterminate value, or to find upon an issue as to whether such creditor had released such stockholder from further liability.
- ID.—PRIVILEGE OF STOCKHOLDERS TO PAY DEBT—DISCHARGE OF LIABILITY—CONSTRUCTION OF CODE—SUBSCRIPTION TO STOCK NOT INCLUDED.**—The privilege given to a stockholder by section 322 of the Civil Code to pay a debt of the corporation in discharge of his liability only applies to his statutory liability to the creditors of the corporation, and does not apply to his liability upon an unpaid subscription to the stock, which is an asset of the corporation, and is payable to the corporation.
- ID.—PAYMENT OF SUBSCRIPTION.**—A stockholder may at any time pay to the corporation the amount of his unpaid subscription to its stock, in discharge of his liability thereupon.
- ID.—VOLUNTARY PAYMENT OF DEBT OF INSOLVENT CORPORATION—UNAUTHORIZED PAYMENT OF SUBSCRIPTION.**—A stockholder cannot take upon himself the authority of the corporation, and voluntarily pay his subscription to its stock to one creditor of the corporation in preference of other creditors, to their injury. Nor can he, by making such payment, without an agreement with the corporation, acquire a right to have it entered upon the books of the corporation as a payment upon his subscription, or to defend a creditor's bill to enforce the payment of the subscription.
- ID.—PREFERENCE OF CREDITOR BY CORPORATION—COLLATERALS HELD BY BANK—ADJUSTMENT UPON CREDITORS' BILL.**—A corporation may prefer one of its creditors; and a bank, which has received collateral securities for the debt of the corporation to it, in the due course of business, and in good faith, without taint of fraud, is not bound, upon a creditors' bill to reach assets of the insolvent corporation, to surrender its securities for the benefit of other creditors. The other creditors may compel the bank first to exhaust its securities, and to share ratably with them only for the balance of the debt remaining unpaid thereafter.
- ID.—PAYMENTS BY INDORSERS OF CORPORATION NOTE—SHARE IN ASSETS.** The indorsers of a note of the corporation, to the extent of any payments made by them, stand in the relation of ordinary creditors of the corporation, and may share ratably in the assets of the corporation.
- ID.—CREDITORS' BILL—RIGHTS OF CREDITORS—RECEIVER—RATABLE DISTRIBUTION OF FUND.**—A creditors' bill may be filed against one or any number of the stockholders of an insolvent corporation to compel payment of their unpaid subscriptions to stock. Ordinarily, such a bill is brought for the benefit of all the creditors who may

choose to come in, and the court will, without the formality of a call not made by the corporation, order the payments to be made to a receiver for the benefit of the creditors, and the fund realized therefrom is distributed ratably among the creditors.

**ID.—INTERLOCUTORY DECREE—FINDINGS AS TO CORPORATE DEBT—UNAS-
CERTAINED LIABILITY.**—Where the decree appealed from is in its nature interlocutory and not final, and is sustained by a proper finding that the debts of the corporation were largely in excess of all the unpaid subscriptions to its stock, the fact that the exact liability upon the balance of an indorsed note held by a bank subject to the application of collateral securities in reduction thereof, upon which note appellants were indorsers, was not and could not be ascertained by the interlocutory decree, is not ground for its reversal.

ID.—SUBSCRIPTION BY DECEASED PERSONS—FORM OF JUDGMENT.—Where the claims of creditors of the insolvent corporation were presented against the estate of a deceased subscriber to the stock of the corporation a judgment under the creditors' bill that the administrator do pay the amount of the subscription in due course of administration to a receiver appointed by the court, to be subject to the further order of the court, is proper in form.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion.

Woods & Levinsky, for R. C. Sargent et al., Appellants.

Nicoll & Orr, for George A. McKenzie et al., Appellants, and for Stockton Combined Harvester and Agricultural Works et al., Respondents.

Ansell Smith, and Gus G. Grant, for Daniel Houser, Appellant.

Minor & Ashley, for Plaintiff Charles M. Welch, Administrator, etc., Respondent.

Budd & Thompson, for Defendants T. B. Baldwin and T. B. Fraser, Respondents.

W. B. Nutter, for Stockton Savings and Loan Society, Intervenor, Respondent.

W. W. Middlecoff, for J. A. Louttit, Executor, etc., Intervenor, Respondent.

CHIPMAN, C.—This is an equitable action brought by a creditor of the Stockton Combined Harvester and Agricultural Works, a corporation, and to obtain a judgment against certain stockholders therein to the extent of the unpaid balance due from them on their subscription to the capital stock of said defendant corporation; to have certain transfers of stock, alleged to have been fraudulently made, declared illegal, the transfers canceled, and that judgment be entered against the transferrers. General relief is also asked. The pleadings are multitudinous and present many phases all grouping around the defendant corporation, while all the pleaders seek some sort of relief from it and from each other.

Plaintiff's intestate, on April 28, 1894, became a judgment creditor of the corporation. Plaintiff alleges that at a time when the corporation was insolvent certain defendants, for the purpose of evading liability, transferred, without consideration, to certain other defendants, alleged to be then and now insolvent, specified shares of its capital stock, Defendant Houser pleads certain facts relating to the way he acquired his stock as exempting him from liability thereon; that he obtained his stock as fully paid up and unassessable, and that he had settled with the intervenor—the Stockton Savings and Loan Society—and had been by it released. Some of the defendants file cross-complaints setting up that they are holden as indorsers on a certain note given by the corporation to the intervenor, the loan society, for \$60,000, of which \$57,000 remain unpaid. These defendants allege that some of the stockholder defendants still owe twenty-five per cent on their capital stock, and they seek to have the fund arising from such stock applied to said note. Defendant R. C. Sargent files a cross-complaint, much the same as the last above defendants, and in a still further cross-complaint avers that he and certain other defendants on March 17, 1892, executed to defendant J. P. Sargent their promissory note for \$50,000, upon which the makers obtained that sum of money and advanced the same to the corporation under an agreement that it would pay the note when due; that it paid all of said note except \$16,069.68, for which

unpaid balance the holder of the note has sued the makers; this defendant prays that the assets of the corporation may be applied to its indebtedness generally, including this note. Defendant Baldwin also files a cross-complaint alleging that the corporation owes him and another attorney a fee, of which his share is \$500, and prays that its assets may be applied to its debts, including this claim. The loan society, like plaintiff, has a judgment against the corporation, entered December 28, 1893, upon which, by complaint in intervention, it claims an unpaid balance of \$153, 034.27, and prays payment be made to the loan society, ratably with other indebtedness of the corporation, out of any sum found coming to the corporation from the stockholders. Plaintiff answers this intervention and among other things alleges that the loan society holds securities given it by the corporation sufficient to pay this judgment, and that this intervenor loan society, should not share the other assets of the corporation without delivering up its securities to the common creditors' fund. James A. Louttit, as executor, intervenes, setting up that his testatrix, on February 18, 1885, obtained a judgment against the corporation for \$13,966.90, no part of which has been paid; he sets up substantially the facts as pleaded by plaintiff, and asks to have the fund derived from the unpaid stock applied ratably on this judgment. Executions on these several judgments were returned *nulla bona*. The foregoing will convey a general idea of the issues.

Certain, but not all, of the defendants appeal from the order denying their several motions for a new trial. There is no appeal from the judgment. The court found, as conclusions of law, that there is due from the corporation to plaintiff, the intervenors, and certain cross-complaints, a sum largely in excess of the unpaid balances due on the capital stock of the corporation. That the court cannot fix the amount now due the loan society until the unpaid subscriptions are paid in and the value of the securities held by the loan society is ascertained and the securities are collected. That cross-complainants R. C. Sargent and Baldwin are entitled to no credits by reason of the matter set forth in their cross-complaints and answers; that as to the equities claimed by certain other defendants and cross-complainants, the

court cannot entertain or consider them, but will do so when the amount due on the unpaid stock shall have been paid in, and until such payments said equities cannot be ascertained; that the several transfers of stock in the pleadings and findings mentioned, except as to defendant Fred M. West, are fraudulent and void, and as to West's transfer it is void as against the creditors of the corporation; that judgment should be entered in favor of certain parties against certain named defendants in amounts named, being the amounts due on the unpaid stock of the corporation; that there being divers persons interested in the fund to arise from said subscriptions to the stock of the corporation, it is necessary that a receiver be appointed to receive all sums paid under the judgments, to be held subject to the order of the court.

It is quite difficult, within any reasonable space to fairly present the facts and the law upon the various conflicting interests involved. Avoiding unnecessary minutiae we will endeavor to dispose of the salient questions. It sufficiently appears from the evidence that the corporation was insolvent when the transfers of stock complained of were made as found by the court, and has been insolvent ever since, and that the transferrers knew the fact; and the evidence also sustains the finding that the transfers were made out of the ordinary course of business, were voluntary and without valuable consideration, and were made to insolvent or irresponsible transferees, and, except as to defendant F. M. West, with intent on the part of the transferrers to escape liability. This finding relates to the following defendants: R. C. Sargent, William Inglis, L. U. Shippee (defendant Tarbox's intestate), C. Grattan, F. M. West, Otis Perrin (defendant Kate M. Perrin's testate), Kate M. Perrin, W. H. McKee, and Frank Burton. The owners of shares when the action was begun, not embraced in the foregoing category, are: Daniel Houser, W. A. Shippee, B. F. Langford, C. H. Fairchilds, George A. McKenzie, F. T. Baldwin, P. B. Fraser, S. S. Littlehale and George Inglis. There is no finding as to defendant and stockholder T. H. McCall, who owns eighty shares, for the reason that he has not appeared and is beyond the jurisdiction of the court, being a nonresident. It was found that defendant and stockholder Fair-

childs had been discharged of liability by insolvency proceedings. It was found that there remained unpaid on all the shares of the defendants above named a balance of twenty-five per cent except on the ten shares of Littlehale, which were fully paid up; and that the corporation had neglected and refused to levy any further assessments upon the shares owned by these defendants, or to collect the unpaid subscriptions.

Generally speaking, the law places no restriction upon the right of a stockholder of a corporation to transfer his stock so long as the corporation is solvent. But, as was said by Mr. Justice Temple in *National etc. Co. v. Story etc. Co.*, 111 Cal. 531: "The American doctrine is that after the corporation has become insolvent, and the stockholder knows this, and especially if the corporation has ceased to do business, a shareholder cannot transfer his stock to an insolvent or to an irresponsible person, so as to relieve himself from liability"; and it is added: "I do not find from the cases that it is necessary to find, in addition to the above facts, that there was an actual intent to defraud." (See the authorities cited in the opinion; 3 Thompson on Corporations, sec. 3259.) The questions presented in the present case relate mostly to the application of settled principles to the claims of the various parties. It becomes necessary, therefore, to consider the separate defenses made. The appellants are defendants Houser, R. C. and J. P. Sargent, McKenzie, William Inglis, W. A. Shippee, Grattan, F. M. West, Kate Perrin for herself and as executrix of Otis Perrin, McKee, Tarbox, as administrator of L. U. Shippee's estate, and Langford. Neither the corporation nor the loan society appeals.

As to defendant Houser: When the third and last assessment of twenty-five per cent on the stock of the corporation was levied Houser refused payment, whereupon the corporation brought an action to enforce collection. In his answer he set up, at that time, the facts now pleaded by him in defense to plaintiff's action. It was held here that he was liable on his stock (*Stockton etc. Works v. Houser*, 109 Cal. 1); and so far as the same facts are now pleaded that case is conclusive against his present contention. In his answer to the intervention of the loan society, but not elsewhere in the pleadings, he alleges a full and complete settlement with the loan

society, and a full accord and satisfaction of any and all claims it holds or held against him by reason of his ownership of said shares of the corporation stock. There was evidence that Houser paid \$6,000 in compromise of the suit to collect the third assessment, and the witness testified that he understood the settlement to include all claims the loan society had against Houser, and that it included all judgments and all indebtedness. A receipt is in evidence showing what the \$6,000 were paid for, and it refers only to the indebtedness, the subject of the then litigation, and nothing in it points to a release from any unpaid balance on the stock which is the subject of the present action. It is very doubtful whether the evidence will justify the inference that the loan society intended to release Houser from its claim to any future liability on his stock as to which twenty-five per cent remained unpaid, and the evidence went in upon the understanding that it did not affect the plaintiff. We may assume, however, that the evidence showed a full release as to the bank of every liability. The court found that there was due from Houser on his four hundred shares the sum of \$10,000, and made no finding as to the release pleaded. Houser now claims that it was error not to find upon the issue as to the release, and that he in any event was liable only for his proportion to satisfy the claims of plaintiff and intervenor Louttit; and as the findings show him indebted for the full sum of ten thousand dollars, for which judgment was rendered, this would require him to pay the full amount to the loan society if plaintiff and Louttit were paid by others, or if Houser were released by them or either of them. It is further objected that there was no finding as to the amount due the loan society, and that Houser was injured by failure to find this fact. The court found the amount due plaintiff and intervenor Louttit. The president of the loan society testified: "It is impossible to name the exact amount now due the bank, as it depended upon our ability to collect the securities we hold." The court found that December 28, 1893, the loan society obtained a judgment against the corporation for \$262,126.55; that the bank held divers securities therefor; "that said securities, assets, and property the said intervenor now has and holds; that the

court does not now undertake to determine what is the value of said security, but finds that the said securities and properties so held by said bank are of great value, but the exact amount whereof is to be hereafter ascertained and determined." There was evidence that some payments had been made which left a balance still due the bank on this judgment of \$118,806.93. There was evidence tending to show that the bank held judgments, as security, in favor of the corporation—in what were known as the "insurance cases"—for \$90,000, upon which some small payments had been made; also held notes in favor of the corporation of the possible value of \$7,000, making somewhat less than \$97,000 of collaterals, which if collected would still leave due on its judgment against the corporation about \$21,000. As we understand the evidence there is due the bank also the unpaid balance on the \$60,000 note.

Plaintiff and intervenor Louttit were entitled to several judgments against each stockholder—the liability being several and not joint (*Baines v. Babcock*, 95 Cal. 590; 29 Am. St. Rep. 158), and their judgments exceed the amount due from Houser. No release from the unpaid balance due the corporation on the Houser stock is pleaded, and the evidence was that it is unpaid, and we have seen that Houser is liable therefor. The issue of a release from the bank is immaterial. Houser cannot be prejudiced at this time by failure to find upon it. If upon the final hearing nothing is found to be due from him to the bank it will receive no part of the \$10,000 paid in by him.

As to defendant William Inglis: The court found that there remained unpaid on his one hundred and eighty shares the sum of \$4,500. It appears that he transferred to his brother George, fifty shares on December 7, 1892, and one hundred and thirty shares on June 8, 1893; William was president of the corporation, which, while he was such president, executed its promissory note to the bank for \$60,000, dated January 2, 1891, heretofore referred to. This note was indorsed by William Inglis and other stockholders of the corporation. Action was brought on this note by the bank, and it is now pending, for an alleged balance of \$57,036.75 and interest. It appears that Inglis executed a joint and several note with other stockholders to J. P. Sargent,

dated March 17, 1892, for \$50,000, to raise money for the corporation, and it was paid to the corporation at the time upon the alleged agreement that it would pay the note. The corporation did pay all but an alleged balance of \$16,069.88. Suit was brought by the holder of the note and judgment was entered therein since this action was commenced. There is no evidence of its payment. On September 30, 1893, some months after he transferred his stock to his son George, William Inglis paid to the bank \$4,500, to which at that time the corporation was largely indebted much beyond this sum. This payment was the exact amount due as unpaid subscription on his stock. George Inglis, William's transferee, was secretary of the defendant corporation at the time. He testified that the bank notified him of the payment and that it was on account of the corporation indebtedness to the bank, and that he understood from his father that it was intended as the unpaid balance due on his shares. In the handwriting of the bookkeeper of the corporation is the following entry in the journal: "Stockton Savings and Loan Society, to capital stock, \$4,500.00, for amount paid by William Inglis as full payment on one hundred and eighty shares of stock in the S. C. H. & A. Works, at \$25 per share." The ledger showed the loan society debited and the corporation credited this amount. It was not shown by whose authority these entries were made by the bookkeeper; the bookkeeper was not a witness. There was no corporate action, by resolution or otherwise, authorizing the payment or the entry or subsequently ratifying the payment. There is in evidence a resolution passed by the bank reciting the receipt of this \$4,500 payment and that Inglis "has offered to pay to this corporation the sum of \$25 per share on such stock so held by him, amounting to the sum of \$4,500, and for full payment of his proportion as stockholder of said debt (referring to the liability of the corporation to the bank) other than and exclusive of a certain note (of said corporation) for \$60,000 indorsed by said William Inglis and others, providing, in consideration of said payment, he, the said William Inglis, would be relieved from any further personal liability as such stockholder for such debt other than

and exclusive of said note," etc. At this time the corporation was insolvent, which fact was known to Inglis and the bank.

The code provides that "if any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt" (Civ. Code, sec. 322); and he may thus discharge his statutory liability as a stockholder without waiting to be sued, and payment, if *bona fide*, would be a bar to an action to collect anything further from the stockholder upon his statutory liability. The liability of the stockholder to the corporation for the unpaid balance of his subscription is a different matter altogether and is an asset of the corporation—is payable to the corporation and no one else. Section 331 of the Civil Code provides: "The directors of any corporation . . . may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof." Then follow sections directing when assessments may be levied, the manner of levying and collecting the same, etc. It is in evidence that no assessment had been levied by the corporation to enforce payment of the unpaid balance due on its outstanding shares. There was no authority given to Inglis by any corporate act of the corporation to make any payment to the bank in discharge of his liability to the corporation, without which we do not think he could relieve himself from his liability to it. If one stockholder of a corporation could take upon himself such authority all could do so, and the directors would lose control of one of its principal sources of revenue. If the corporation were solvent probably no question would be made by it or by creditors, but where it is insolvent, and a stockholder, knowing the fact, undertakes thus without authority to divert the assets of the corporation, we do not think he should be heard to plead such a payment in discharge of the liability. He could not set off his own debt against the corporation or its creditors on account of unpaid capital stock in an action such as this is (1 Cook on Stock and Stockholders, sec. 193); why should he be permitted to do so indirectly by paying a corporate debt to the bank? We do not think it necessary to decide whether the unpaid balances on the stock constituted a trust fund in the hands of the directors which could not be

disposed of by either a stockholder or by the directors for the benefit of any one creditor, but must be held by them in trust for the benefit of all the creditors—the corporation being insolvent. The trial court so held, and the point is much discussed in the briefs. We decide only that Inglis' voluntary payment to the bank was unauthorized by the corporation and did not discharge him from his liability to the creditors of the corporation in this action.

Where the corporation is insolvent, and the directors neglect or refuse to make a call, courts of equity will disregard the formality of a call and will order the unpaid subscriptions to be paid to a receiver for the benefit of the corporate creditors. (1 Cook on Stock and Stockholders, sec. 108; *Glenn v. Saxton*, 68 Cal. 353.) Stockholders may pay to the corporation the amount of their subscription at any time and thus discharge their liability, but, when the corporation is insolvent, they cannot take upon themselves the authority of the corporation and pay the subscription to one creditor to the injury of the other creditors.

Otis Perrin made a payment to the bank at the same time and under similar circumstances and for the same purpose as Inglis made his payment. What has been said as to Inglis applies to Perrin.

Certain stockholders defendants set up by cross-complaint, as we have heretofore stated, that they are indorsers of the corporation note for \$60,000, and that judgment has been rendered against them for an unpaid balance. Defendant R. C. Sargent set up that he and other stockholders are defendants in an action to enforce payment of a note made by them for the benefit of the corporation. Defendant Baldwin pleaded against his liability a claim due him from the corporation. These defendants ask that the unpaid balance due on stock subscriptions be applied ratably in payment of the debts for which they are liable. Intervenor, the loan society, made a similar claim to share ratably with other creditors.

As to intervenor, the loan society: The court held that its claim for the balance still due, after its securities are realized upon, ranks with plaintiff's and Louttit's claims and must share ratably with them and other creditors. It was also held

that the bank is not obliged to surrender its securities for the common benefit of all creditors. We see no error in thus holding. The securities came into the hands of the bank in due course of business untainted by fraud, and no lack of good faith is alleged or proved. The corporation had a right to prefer the bank (Civ. Code, sec. 3432); and, under section 3433 of the Civil Code, the creditors, other than the bank, can compel the bank to first exhaust its securities before it can share the other assets of the corporation.

The court, we think, properly held that indorsers of the corporation note for \$60,000 stand in the relation of ordinary creditors of the corporation to the extent of any payment made by them and may share ratably the assets of the corporation. So also Baldwin, on making proof of his claim against the corporation. So also Inglis and Perrin, who paid some portion of the ordinary debt of the corporation; and, besides, they have some equities arising out of the agreement under which they paid this portion of the corporation debt to be adjusted between them and the bank, as also has Houser.

The finding as to the Sargent note is not questioned in the briefs, and we pass it without comment.

Ordinarily, the bill is brought for the benefit of all the creditors who choose to come in, but the action may be against a single stockholder or any number of them. (1 Cook on Stock and Stockholders, secs. 205, 206); and the fund realized from the suit in equity is distributed ratably among all the creditors. (*Mathis v. Pridham*, 1 Tex. Civ. App. 58; 1 Cook on Stock and Stockholders, sec. 193. See, also, *Harmon v. Page*, 62 Cal. 448; *Lamar Ins. Co. v. Gulick*, 102 Ill. 41; *Hatch v. Dana*, 101 U. S. 205; *Baines v. Babcock*, *supra*; *Potter v. Dear*, 95 Cal. 578.)

Appellants complain that the court failed to find upon the issue presented as to the \$60,000 note of the corporation of which they were indorsers; that the court should have found the amount due intervenor, the loan society; and that there is no finding of a definite amount due from the defendant corporation greater than the sums due plaintiff and intervenor Louttit—in all \$17,542.15—while the aggregate judgment against all the defendant stockholders is \$51,200. It is claimed that the judgments against the appealing defendants

—in all \$20,575—are \$3,035 in excess of all the debts found by the court to exist against the corporation. It may be that a court of equity would not order full payment by all stockholders of unpaid subscriptions, where it was clearly unnecessary to do so to meet the claims proved. However this may be, it appears from the evidence that the corporate debt is largely in excess of the unpaid subscriptions, and the court so found. We think this was a sufficient finding of the material ultimate fact upon the issues presented by plaintiff and intervenors Louttit and the loan society, and was not inconsistent with the fact found that the court could not definitely determine the exact amount due the bank until the securities held by it were realized upon. There was some evidence of the tentative value of these securities, but not of their actual cash value. By far the largest security was an unpaid judgment against certain insurance companies; the remaining securities were promissory notes and book accounts of uncertain value. We think the court would not have been warranted by the evidence in determining the exact sum due the bank after deducting its securities; but there was sufficient evidence to justify it in finding that the debts of the corporation were largely in excess of the unpaid subscriptions. For the purposes of the decree, which was in effect only interlocutory, the findings are sufficiently responsive to the issues.

It is urged that a judgment was erroneously entered against the estate of Otis Perrin, deceased. The judgment was that the administrator pay in due course of administration, and payments were ordered to be made to a receiver and to be subject to the further order of the court. The claims of plaintiff and intervenor Louttit were duly presented to the representative of the estate. Whether the judgment is sustained by the findings cannot be questioned on an appeal from an order denying new trial (*Brison v. Brison*, 90 Cal. 323); and the findings we think are supported by the evidence. Besides, we think the judgment as entered was proper.

It is advised that the judgment and order be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Van Dyke, J., Harrison, J., Garoutte. J.

[Sac. No. 664. In Bank.—December 1, 1899.]

LEWIS BERGEVIN, Respondent, v. H. W. CURTZ, Appellant.

ELECTION—ELIGIBILITY OF SUPERVISOR—"ELECTOR"—CHANGE OF RESIDENCE—REGISTRATION.—A person elected supervisor in a district to which he had changed his residence from another district more than one year prior to the election, and who, during that period and at the time of the election, was an "elector" of that district, as defined in section 1 of article II of the constitution, was eligible for the office in that district, under section 15 of the County Government Act of April 1, 1897, notwithstanding he did not change his registration from the precinct of his former residence until a little more than thirty days prior to the election.

ID.—REGISTRATION NOT A QUALIFICATION OF AN ELECTOR.—Registration is not a "qualification" of an elector, and cannot add to the qualifications fixed by the constitution; but it is to be regarded as a reasonable regulation by the legislature for the purpose of ascertaining who are qualified electors, and of having their names enrolled upon an authentic list, in order to prevent illegal voting.

ID.—ELIGIBILITY NOT INCLUSIVE OF REGISTRATION.—An elector may be eligible to the office for which he was elected, though his name may not be upon the great register, and though for that reason he could not have voted at the election.

ID.—"ELECTOR" AND "VOTER"—DISTINCTION AS TO QUALIFICATIONS.—The constitutional qualifications of an elector are not the same thing as the legal qualifications of a voter. The voter is the elector who votes; and an elector may not be legally qualified to vote.

ID.—CONSTRUCTION OF CODE—"QUALIFIED ELECTOR"—"REGISTRATION."—Section 1083 of the Political Code, assuming to define who "shall be a qualified elector," which adds to the constitutional qualifications that of enrollment upon the great register of the county fifteen days prior to the election, must be construed to use the words "qualified elector" in the sense of an elector who has the right to vote.

APPEAL from a judgment of the Superior Court of Alpine County. N. D. Arnot, Judge.

The facts are stated in the opinion.

Woods & Levinsky, and P. N. Packard, for Appellant.

W. M. Thornburg, and Bruner & Brothers, for Respondent.

COOPER, C.—Appellant was duly elected to the office of supervisor of supervisor district No. 1 of Alpine county at the November election, 1898. This is a proceeding by respondent, as an elector, contesting the right of appellant to hold said office solely on the ground that at the time of the election he was not eligible thereto. The court below rendered judgment against appellant, declaring that at the time of said election he was ineligible to said office, and by its decree annulled and set aside the election. The defendant has appealed from the judgment, and the case is brought here on the judgment-roll. It appears from the findings that appellant is a natural born citizen of the United States, twenty-seven years of age, that he has resided in the state of California all his life, in the county of Alpine ever since June, 1894, and in precinct No. 1 in supervisor district No. 1 since the first day of July, 1897. That appellant's name appears upon the great register of said county June 21, 1894, in precinct No. 2 in supervisor district No. 2, but that he removed from said last-named precinct and district into precinct and district No. 1 about July 1, 1897. That appellant's name remained upon said great register in precinct 2 and supervisor district 2 of said county until the third day of October, 1898, when at his request it was canceled upon the said precinct register No. 2, and placed upon the precinct register of precinct No. 1 in said supervisor district No. 1. That on the eighth day of November, 1898, the appellant was a duly registered voter in said precinct No. 1 in supervisor district No. 1, but had only been such since the third day of October, 1898, and was not a registered voter in said supervisor district No. 1 for one year next preceding the day of election. The court below, as a conclusion of law from the said findings, adjudged that appellant had not been an elector of district No. 1 for one year immediately preceding his election, and was therefore not eligible to the office at the time he was elected. This is the sole question to be determined in the case. It is provided in section 15 of the County Government Act of April 1, 1897 (Stats. 1897, p. 455), that: "Each member of the board of supervisors must be an elector of the district which he represents, must reside therein during his incumbency, and must have been such elector for at least one year immediately preceding his election."

In order to find the meaning and definition of elector we must look to the constitution of the state. An elector is a person possessing the qualifications fixed by the constitution. (*O'Flaherty v. Bridgeport*, 64 Conn. 161.)

It is provided in the constitution, article II, section 1, that every male citizen of the United States "who shall have been resident of the state one year next preceding the election, and of the county in which he claims his vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law." The findings of the court show that appellant was an elector of the district for which he was elected for more than one year immediately preceding the November election. He had been a resident of the state, county, and precinct for more than one year immediately preceding the election. He possessed all the qualifications of an elector as prescribed by the constitution, and, unless we should hold that he must have possessed some qualification other than that laid down by said instrument, he was at the time of his election eligible to the office. We do not think the legislature, even if it attempted to do so, could add any essential to the constitutional definition of an elector. It is settled by the great weight of authority that the legislature has the power to enact reasonable provisions for the purpose of requiring persons who are electors and who desire to vote to show that they have the necessary qualifications, as by requiring registration, or requiring an affidavit or oath as to qualifications, as a condition precedent to the right of such electors to exercise the privilege of voting. Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only reasonable regulations for the purpose of ascertaining who are qualified electors, and to prevent persons who are not such electors from voting. These regulations must be reasonable and must not conflict with the requirements of the constitution. The legislature has required that all electors, as a condition of the right to vote, shall have their names properly and in due season entered upon the great register of the county. (Pol. Code, sec. 1094.) The section provides that in the register shall be entered the names of the qualified electors of the county, and "that any elector who has registered and

thereafter moved his residence to another precinct in the same county thirty days before an election may have his registration transferred to such other precinct upon his application." The legislature has made no attempt to change or add to the qualifications of an elector, but has simply provided a means whereby the elector who is entitled to vote may be known by having his name enrolled upon an authentic list. It was said by the court in *Webster v. Byrnes*, 34 Cal. 276, in discussing the right of a party to vote in a case where his vote was challenged: "The question here is, Is he a qualified elector of the precinct at which he voted, and was his name at the time upon the great register and poll list?" In the case of *Welch v. Williams*, 96 Cal. 367, it was said by the chief justice, speaking for the court in Bank: "The object of the registration law is to prevent illegal voting by providing, in advance of election, an authentic list of the qualified electors."

In the case of *Sanford v. Prentice*, 28 Wis. 362, it is said: "There is a difference between an elector or person legally qualified to vote and a voter. In common parlance, they may be used indiscriminately, but, strictly speaking, they are not the same. The voter is the elector who votes—the elector in the exercise of his franchise or privilege of voting—and not he who does not vote."

In this case the appellant would have been eligible to the office of supervisor of the district for which he was elected if his name had not been on the great register. He could not have voted at the election, and thus would have been deprived of voting for himself if he so desired, but having the constitutional qualifications he was eligible to the office. The court below evidently was of the opinion that one must have his name enrolled upon the great register before he could be an elector, and this because of the reading of section 1083 of the Political Code. That section, after enumerating the constitutional qualifications of a voter, adds, "and whose name shall be enrolled on the great register of such county fifteen days prior to an election shall be a qualified elector," etc. The words "qualified elector" are used in the sense of elector who has the right to vote. It appears plain that the legislature recognized the fact that there might be electors who were not so qualified. The County Government Act does not provide,

as a condition of eligibility to the office of supervisor, that the candidate must have been a qualified elector of the district which he represents for at least one year.

We advise that the judgment be reversed and the cause remanded to the lower court, with directions to render judgment on the findings in favor of appellant.

Chipman, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded to the lower court, with directions to render judgment on the findings in favor of appellant.

Beatty, C. J., Van Dyke, J., McFarland, J., Henshaw, J.

[SAC. NO. 650. Department Two.—December 4, 1899.]

In the Matter of the Estate of E. I. UPHAM, Deceased.

WILLS—DATE OF DEVISES AND BEQUESTS—ALTERATION OF COMMON LAW BY CODE.—Section 1332 and 1333 of the Civil Code have the effect to abrogate the old common-law distinction by which devises spoke as of the date of the will, and bequests as of the date of the testator's death; and both devises and legacies in this state speak of the latter date.

ID.—RESIDUARY DEVISE—DISPOSITION OF LAPSED DEVISE.—Where there is a valid residuary devise, the property mentioned in a lapsed devise goes to the residuary devisee, and not to the heirs, unless a contrary intent is clearly expressed in the will.

ID.—RESIDUARY DEVISE TO CHARITABLE USE.—A residuary devise to the legally constituted and qualified trustees or managers of a Good Templars' Orphans' Home, in a specified locality, "in trust for the use and benefit of the orphan children of said institution," is a valid devise of the residue of the estate to a charitable use.

ID.—LIBERAL CONSTRUCTION OF CHARITIES.—Charities, both as to the trustees and the beneficiaries, are more liberally construed than are gifts to individuals.

ID.—DEVISE OF CHARITY TO UNINCORPORATED BODY—SUPERINTENDENCE OF COURT OF EQUITY—EFFECTUATION OF TRUST.—The fact that the trustees of the designated orphans' home to whom the devise was made, were not, themselves an incorporated body, though selected

biennially under the auspices of an incorporated grand lodge of Good Templars, to manage and control the orphans' home, cannot affect the validity of the charity. A court of equity will not allow a charitable use to fail for want of a legal trustee; and, if the founder describes the general nature of the charitable trust, he may, leave the details of its administration to be settled by trustees under the superintendence of a court of equity, and the court will appoint trustees, if necessary to effectuate the trust.

II.—PROVISION FOR RATABLE APPORTIONMENT OF DEVISES—RESIDUARY DEVISE NOT REVOKED.—A residuary devise, following special devises and bequests, is not revoked by a subsequent paragraph providing that the foregoing devises are to be increased or diminished ratably, with the exception of two devises specified, if the estate is more or less than sufficient to pay the devises and bequests; and such provision does not prevent the falling into the residuary devise of lapsed devises or legacies, or invalid and void devises or legacies.

III.—RESIDUARY DEVISE, HOW CONSTITUTED.—No particular mode of expression is necessary to constitute a residuary devise. It is sufficient if the intention of the testator be plainly expressed in the will that the surplus of the estate, after payment of debts and legacies, shall be taken by a person there designated.

APPEAL from an order of the Superior Court of Solano County denying a petition for partial distribution of the estate of a deceased person. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

Freeman & Bates, for Appellants.

J. M. Walling and Robert Thompson, for Trustees of Good Templars' Home for Orphans, Respondents.

John M. Gregory, for Minor and Unrepresented Heirs.

McFARLAND, J.—E. I. Upham died leaving a will which, on its face, purports to dispose of all his property. His brothers, Joseph M. and Lorenzo Upham, who are his next of kin and only heirs at law, filed a petition in the probate court for a partial distribution to them of certain parts of the estate which they claim had not been disposed of by the will, and therefore went to them as heirs. The court held that the whole estate had been disposed of by the will, and that as petitioners were not devisees or legatees they were not entitled to partial distribution. The petition was denied, and from the order denying it the said brothers Joseph M. and Lorenzo appeal.

By paragraphs I, II, and III of the will a certain piece of land known as the Vacaville Orchard, and ten thousand dollars in money, are given to Martha Muzzy, a relative of testator, and also sufficient funds to take care of the family cemetery lot; by paragraph IV the sum of ten thousand dollars is given to Sarah Muzzy; by paragraphs V, VI, VII, and VIII the sum of five thousand dollars each is given to certain named legatees; by paragraph X certain small sums of money are given to employees of the testator; and no objection is made in this case to any of the foregoing paragraphs. The contention of appellants is based upon paragraphs IX, XI, and XII.

By paragraph IX, which is quite long and somewhat complicated, forty thousand dollars, or, in lieu thereof, a quantity of land equal in value to that sum of money, is given to the executors of the will in trust for the use and benefit of the minor children of the appellants; and it is claimed by appellants that this trust, owing to certain provisions which it contains, is void, and that therefore the property mentioned in it is undisposed of by the will and goes to them as heirs at law. Under our views of the case, however, it is not necessary to pass upon the validity of this trust clause, for if the will creates a residue devisee and legatee, as we think it does, then the latter takes the property described in any devise or legacy which for any reason fails or lapses, and the same does not go to the heir.

Section 1332 of our Civil Code declares the rule above noticed as follows: "A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will"; and section 1333 is the same, except that it refers to a bequest of some personal property instead of a devise of real property. These sections abrogate the old common-law distinction between devises of real property and bequests of personal property, to the effect that a devise speaks from the date of the will and a bequest from the death of the testator, and according to which distinction it was generally held that property mentioned in a void or lapsed devise did not go to the residuary devisee. But under the old authorities, before any change was made by statute,

it was uniformly held that lapsed bequests went to the residuary legatee and not to the heir, and our statutory provisions above referred to are so clear to the point that lapsed devises take the same course that further authorities upon the same question seem needless. However, in New York the statutory law is that a will which in terms disposes of all the testator's real property shall be construed to pass all the real property which he was entitled to devise at the time of his death; and under that statute it has been uniformly held in that state that property mentioned in a lapsed devise goes to the residuary devisee and not to the heir, unless a contrary intent is clearly expressed in the will. (*Ricker v. Cornwell*, 113 N. Y. 115; *In re Benson*, 96 N. Y. 499; 48 Am. Rep. 646; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337; *Carter v. Board of Education*, 144 N. Y. 621; *In re Bonnet*, 113 N. Y. 522; and see, also, *Floyd v. Barker*, 1 Paige, 480; *King v. Woodhull*, 3 Edw. Ch. 79; *King v. Strong*, 9 Paige, 94; *Tindall v. Tindall*, 24 N. J. Eq. 512.)

The main question in the case at bar, therefore, is whether or not a residuary devisee and legatee is created by the will. Such devisee and legatee is clearly created by paragraph XI of the will, if the trust created by that paragraph is not void for other reasons. The paragraph is as follows: "XI. I give and bequeath to the legally qualified and constituted trustees or managers of the Good Templars' Orphans' Home of Vallejo, said county of Solano, in trust for the use and benefit of the orphan children of said institution, any residue and remainder of my estate after carrying out my hereinbefore legacies and bequests." It is contended by appellants that this trust is void for reasons which are, substantially, these:

1. That the bequest is not charitable because the beneficiaries are not named with sufficient definiteness and certainty; and
2. That there are no trustees named capable of taking the property.

We do not think that either of these contentions can be maintained. It must be remembered that charities—both as to the trustees and the beneficiaries—are more liberally construed than are gifts to individuals. (See 2 Story's Equity Jurisprudence, secs. 1165-67 et seq.) That the gift here was for charity is beyond question. It was shown by the evidence—which was properly admitted, under section

1340 of the Civil Code—that the Good Templars' Orphans' Home at Vallejo had been in existence for a great many years, that its purpose was to take care of orphan children, that it accommodated about two hundred of such children, and that about that number were usually and continuously maintained there. To sustain the proposition that this constitutes a "charity" within the legal meaning of the word no further authority is necessary than that of *People v. Cogswell*, 113 Cal. 129; but the truth of the proposition is further illustrated by the numerous cases referred to in the opinion of the supreme court of the United States in *Russell v. Allen*, 107 U. S. 163. It is contended, however, that the trust is void because the parties named as trustees are incapable of taking the property. The trustees of the Orphans' Home, it is true, do not constitute a corporation. It was organized under the auspices of the grand lodge of the Independent Order of Good Templars of the State of California, which is a corporation, and it is under the management and control of a continuous board of trustees, consisting of eight persons, one-half of whom are selected every two years by the order. These trustees seem to be appropriate persons to take charge of this charitable fund, and manage it for the purpose of the trust; but even if it should be held that in a strict legal sense they are not capable of taking, yet the charity would not fail for that reason. A court will not allow a charitable trust to fail for want of a legal trustee. Of course, in this country, courts of equity will not go so far in executing indefinite charities as the courts of equity went in England under the statute of 43 Elizabeth, for there if it could be discovered from a deed or will that anything in the nature of a charity was intended, however vague or indefinite, the chancellor would devote it to some sort of a charity. But in this country courts have been extremely liberal in construing charities, and under principles analogous to the doctrine of *cy pres* have enforced trusts far more indefinite and inexact than the one here involved. The rule upon this subject is very fully laid down by the supreme court of the United States in *Russell v. Allen*, *supra*, as follows: "By the law of England from before the statute of 43 Elizabeth, chapter 4, and by the laws of this country at the present day (except in those states in which it has been restricted by statute or judicial decision, as

in Virginia, Maryland, and more recently in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect, if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead." In *Schmidt v. Hess*, 60 Mo. 591, a gift had been made to the "Lutheran Church," which was unincorporated, and in a suit brought by the trustees of the church they were permitted to show to what church the gift applied; and the court, among other things, said: "No doubt is entertained that the gift under consideration is a charity, and falls within the meaning of the rules of chancery. (2 Story's Equity Jurisprudence, sec. 1164, and cases cited.) And although in consequence of the nonincorporation of the church for whose benefit the grant was made there was no one *in esse* at the time of making the donation capable of being the recipient of the trust, yet, the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation." (Citing cases. See, also, *Lilly v. Tobbein*, 23 Am. St. Rep. 887.) And in section 730 of 2 Perry on Trusts a number of instances are given of charities held to be good which illustrate the principles which sustain the gift to the Orphans' Home here involved. The following is the language there used to which we refer: "It is well settled that the devise of a charitable use to church

wardens, although not a corporation capable in law of holding and transmitting property, will be sustained; so to an institution neither established nor incorporated in the life of the donor; and so a devise to certain officers or their successors in office, or, if they are incapable of executing the trust, then to a corporation to be formed for the purpose, was held by the supreme court of the United States to be a good devise and capable of being carried into effect. A gift to a corporation by a misnomer is good for a charitable purpose, if the corporation can be identified; gifts in trust to voluntary associations for charitable purposes have been held good; and so of gifts to churches, societies, conferences, yearly meetings of Friends, and families of Shakers, and other organizations. These bodies, or *quasi* corporations, have been considered so far under the control of a court of equity that they would be compelled to execute the duties of the trust imposed upon them, and could be dealt with for a breach." Therefore, under the principles of the authorities above noticed, the gift to the trustees of the Orphans' Home is a valid charity; and, this being so, a residuary legatee and devisee was thus created, to whom lapsed legacies go under the statutory provisions above quoted. There are no words in the will expressing a contrary intent, and the rule that "where the residuary bequest is not circumscribed by clear expressions in the instrument, and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid disposition, or other reason." (*Riker v. Cornwell, supra.*) With respect to other objections made by appellants, it may be said that we see no reason why a court of equity cannot enforce this trust, or why there are no beneficiaries in whose interest it could be enforced. In the latter respect there is no difference between this case and any other case where the benefit is for an indefinite number of persons. We see nothing in the objection that it is not stated in the will whether the benefit is to be for orphans or half orphans; the will uses the word "orphan," and that has a legal meaning. If the clause creates a charity, it is not obnoxious to the law against perpetuities, and is expressly warranted by section 1313 of the Civil Code. No question is raised here as to the gift being

for more than one-third of the estate. The contention that too much discretion is given to the trustees is answered by the citations and quotations from authorities hereinbefore given.

It is contended by appellants that paragraph XII revokes, or annuls, or renders inoperative paragraph XI. Paragraph XII is as follows: "If my estate should be more or less than sufficient, after paying my debts, to provide for and pay all above-mentioned devises, bequests, and legacies, then all the said devises, bequests, and legacies shall be increased or diminished ratably except the provisions for the said cemetery lot and the devise to Martha Muzzy of the parcel of land of sixty acres in Vaca valley, known as the Vacaville Orchard." This paragraph, construed in the light of the whole will, may, perhaps, be considered as to some extent uncertain and ambiguous. Respondent contends that it simply provides for the possible contingency of the residue going to the Orphans' Home being greater than one-third of the estate. But, however that may be, it certainly cannot be construed as destroying, or as intending to destroy, paragraph XI. Paragraph XI is one of "the above-mentioned devises, bequests, and legacies"; and how can a subsequent clause which expressly refers to and recognizes as existing a previous clause be held to revoke or destroy the latter, where there are no operative words to that effect, or which express any such intent? Moreover, it is a rule of construction of wills—declared by our code (Civ. Code, sec. 1322)—that: "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will"; and, applying this rule to the case at bar, it is plain that the "clear and distinct" provisions of paragraph XI are not revoked or destroyed by the language of paragraph XII, or by any "inference or argument from other parts of the will."

The foregoing facts make it unnecessary to consider the question whether, if paragraph XII could be construed as revoking paragraph XI, it would not follow that paragraph XII itself constituted as residuary legatees the other devisees and legatees whose devises and legacies were to be increased "ratably"—thus leaving appellants in no better position. On

this point, however, it may be well to observe that, as said in *Morton v. Woodbury*, 153 N. Y. 243; "No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the will, that the surplus of the estate, after payment of debts and legacies, shall be taken by a person there designated." And where a testator gives all of his property remaining after the payment of specific gifts, though the fund be estimated in money, the gift of that which thus remains is not specific, but carries everything which has not been effectually disposed of by reason of lapses, or invalid and void devises or legacies. (*Hulin v. Squires*, 63 Hun, 352; 18 N. Y. Supp. 309; *Bland v. Lamb*, 2 Jacob & W. 399; *Carter v. Taggart*, 16 Sim. 423.) In the case at bar, there is no hostility or contest between the various devises and legatees. They recognize each other's rights as expressed in the will, and stand together in defending it against the assaults of appellants.

The conclusions above reached are strengthened by the consideration that it was the clear intent of the testator, expressed in the will, that no part of his estate should go to appellants; and this consideration is given great weight in all the decided cases where questions similar to those arising in the case at bar were involved. We do not see how the disputed clauses of the will, which we hold to be good, can be overthrown without wrongfully applying to a charity those strict and technical rules which can be rightfully invoked only as against private trusts.

The order appealed from is affirmed.

Henshaw, J., and Temple, J., concurred.

[Crim. No. 557. Department One.—December 5, 1899.]

THE PEOPLE, Appellant, v. SAMUEL B. TERRILL, Respondent.

CRIMINAL LAW—FORGERY—INSUFFICIENT INDICTMENT.—An indictment charging the forgery of a mortgage, which does not state facts showing that the mortgage could have injured or defrauded anyone, or that it was given to secure an indebtedness or other obligation, or that it purported to be a valid writing obligatory, is insufficient to show the existence of any crime.

ID.—PRESUMPTIONS—AID OF INDICTMENT.—The presumptions are all in favor of the innocence of the accused, and in no case can an indictment be aided by imagination or presumption. If the facts stated may or may not constitute a crime, the presumption is that no crime is charged.

APPEAL from an order of the Superior Court of Santa Clara County sustaining a demurrer to an indictment. William G. Lorigan, Judge.

The facts are stated in the opinion.

Tirey L. Ford, Attorney General, A. A. Moore, Jr., Deputy Attorney General, and James H. Campbell, District Attorney of Santa Clara County, for Appellant.

Jackson Hatch, and H. L. Partridge, for Respondent.

COOPER, C.—This is an appeal from an order sustaining defendant's demurrer to an indictment. The grand jury of Santa Clara county, on the ninth day of May, 1899, presented an indictment against the defendant in the following language:

"The said Samuel B. Terrill is accused by the grand jury of the county of Santa Clara, state of California, by this indictment, found this ninth day of May, A. D. 1899, of the crime of forgery, committed as follows: The said Samuel B. Terrill, on the first day of December, A. D. 1896, at the county and state aforesaid, uttered, published, and passed as true and genuine a certain false, forged, and counterfeit mortgage of said date, purporting to be made and executed by one George Donlan in favor of Clara A. Fread, said Samuel B. Terrill then knowing the same to be false, forged, and counterfeit, with the intent on the part of said Samuel

B. Terrill to prejudice, damage, and defraud said Clara A. Fread, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

To this indictment the defendant interposed a demurrer upon the grounds that it does not substantially conform to sections 950, 951, and 952 of the Penal Code, and that the facts stated do not constitute a public offense. The court below sustained the demurrer. Forgery is defined in section 470 of the Penal Code as follows: "Every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any . . . deed, lease, indenture, writing obligatory . . . is guilty of forgery." The word "mortgage" is not used in the section nor elsewhere in the code in defining forgery. Conceding that a mortgage is included in the words "indenture or writing obligatory," the indictment must show that the mortgage is such in its legal character as, if genuine, might injure or defraud another. The only description of the mortgage alleged to have been forged is the date, December 1, 1896, "Purporting to be made and executed by one George Donlan in favor of Clara A. Fread." Whether the mortgage was one which could in any manner have injured anyone is, when measured by the indictment, a matter of conjecture. Whether it was given upon real or personal property, upon any property, or upon the planets, is not disclosed. It is not shown that it was given to secure any promissory note or indebtedness of any kind or any obligation. It may have been void on its face, or given in direct contravention of some statute, or it may have been given for an unlawful purpose, and yet the information be true. It is an elementary principle of criminal law that the indictment or information must state that a crime has been committed, either by direct and positive averment in the language of the statute or its equivalent, or by stating facts which show that such crime has been committed. In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and if the facts stated may or may not constitute a crime the presumption is that no crime is charged.

It may be that the defendant is guilty of some offense, perhaps of forgery, but we have nothing to guide us except the indictment. The officer intrusted by the law with the duty of drawing the indictment should have set forth facts showing that a crime had been committed.

The order should be affirmed.

Gray, C., and Haynes, C., concurred.

For the reason given in the foregoing opinion the order is affirmed. Garoutte, J., Harrison, J., Van Dyke, J.

Hearing in Bank denied.

[Crim. No. 597. In Bank.—December 5, 1899.]

Ex parte JAMES KNAPP on Habeas Corpus.

VOID COUNTY ORDINANCE—UNREASONABLE RESTRICTION AS TO TRANSPORTING GAME—HABEAS CORPUS.—A county ordinance forbidding the shipment or transportation of game from the county which has been lawfully killed therein is an unreasonable and oppressive restriction in restraint of trade, and in violation of the rights of private property, and is invalid and void; and a person convicted thereunder must be discharged upon *habeas corpus*.

ID.—UNREASONABLE DISCRIMINATION.—An ordinance intended to discriminate in favor of sportsmen, and against all other persons in respect of the disposition of game lawfully killed, is not a proper exercise of police power. [Per Temple, J., Van Dyke, J., and Harrison, J.]

HABEAS CORPUS in the Supreme Court to review the validity of a conviction in the Justice's Court for violation of an ordinance of Stanislaus County. D. L. Smith, Justice of the Peace.

The facts are stated in the opinion of the court.

V. G. Frost, for Petitioner.

TEMPLE, J.—This is an application for a discharge from custody made on behalf of James Knapp, who was arrested, tried, and convicted upon a charge of violating an ordinance

of the county of Stanislaus. The ordinance declares, in effect, that it shall be a misdemeanor for anyone to hunt, kill, or destroy certain game with the intent to transport, or to cause the same to be transported, without the county; or to offer the same to any person for the purpose of shipping or carrying the same without the county. It also declares that every railroad or transportation company, their agents and servants, who shall transport such game without the county shall be guilty of a misdemeanor.

The prisoner was charged with willfully and unlawfully offering for transportation by Wells, Fargo & Co., from the town of Newman, in Stanislaus county, to San Francisco, two wild ducks which were killed in Stanislaus county.

Serious question has been made as to the power of any county board of supervisors to add either restraints or regulations, to the right to take and kill wild game, to those made by the legislature. We do not find it necessary for the purposes of this case to decide that question. If such further restrictions upon the right to kill game may be made by county boards, such regulations must be reasonable, not oppressive to any class, and must not contravene any established policy of the state. Presumably, the two ducks were lawfully taken by James Knapp in Stanislaus county. It is not charged that they were hunted or killed for the purpose of being transported without the county, though such fact, if it existed, would not have changed the result. Having taken the game lawfully and at a time when it is lawful for anyone to shoot ducks, the ordinance prohibiting their shipment is an unreasonable interference with the right of private property, and an unnecessary restraint of trade. The statutes of the state in regard to game prohibit the offering for sale of game during the time it is unlawful to kill such game. (Stats. 1897, p. 90.) The state regulations upon this particular subject seem complete, and restrict the rights of citizens so far as was necessary to prevent the unlawful killing of game.

It was stated on the argument, substantially, that the ordinance was aimed at "pot-hunters." I understand this phrase covers all except sportsmen. Relatively, a small part of the community only are sportsmen. A law or ordinance

which would discriminate in their favor would not be a proper exercise of the so-called police power. If that be the manifest or admitted purpose of the ordinance, it is void for that reason also.

The prisoner is discharged.

Van Dyke, J., and Harrison, J., concurred.

McFarland, J., concurred in the judgment.

BEATTY, C. J., concurring.—I concur in the judgment on the first ground discussed by Justice Temple. The people of the state being the owner of its wild game, it may be conceded that the state legislature could annex any condition it chose to the privilege of taking it, but a county ordinance forbidding all persons, under penalty, to transport game lawfully taken to the place where they desire to use or dispose of it is violative of the right of private property, as defined and regulated by general law, and necessarily invalid.

[L. A. No. 587. Department One.—December 7, 1899.]

In the Matter of A. M. MEALY and FLORENCE WEEKS STETSON, Partners as A. M. MEALY & CO., Insolvent Debtors, Appellants. PACIFIC CROCKERY AND TINWARE COMPANY et al., Petitioning Creditors, Respondents.

1D.—INSUFFICIENCY OF BOND—WAIVER OF OBJECTIONS.—A bond not petition of creditors in involuntary insolvency against the members of a partnership, which alleges that the debtors made a transfer of their estate, with intent to defraud their creditors, and that in contemplation of insolvency they have made a payment and transfer of their estate, without stating that the first transfer was made "being insolvent," or that the debtors are insolvent, or stating any time when they made any payment or transfer, or to whom it was made, or what property was transferred, is insufficient, both upon general and special demurrer, and cannot sustain an adjudication of insolvency.

1D.—INSUFFICIENCY OF BOND—WAIVER OF OBJECTIONS.—A bond not signed by two sureties and by all of the petitioning creditors as prin-

cipals is insufficient; but objection thereto is waived if not made in the court below at the proper time, and cannot be urged upon appeal for the first time.

APPEAL from a judgment of the Superior Court of San Bernardino County. Frank F. Oster, Judge.

The facts are stated in the opinion.

Leonard & Morris, and E. R. Annable, for Appellants.

Dillon & Dunning, and Curtis & Curtis, for Respondents.

CHIPMAN, C.—Involuntary insolvency. The petitioning creditors had judgment by default, upon demurrer to their petition being overruled, adjudging appellants to be insolvent. The appeal is from this judgment. The points urged on the appeal are: 1. That the demurrer should have been sustained; and 2. That no sufficient bond was filed.

1. The demurrer was for insufficiency of facts and on the further ground that the petition is uncertain and unintelligible in that it does not state when the alleged assignment, sale, or transfer was made, and is ambiguous for like reason and for the further reason that it does not state to whom said assignment, transfer, sale, and conveyance was made.

The allegation of the petition is: "That said debtors reside and have their place of business in said county of San Bernardino and made an assignment, sale, conveyance, and transfer of their estate, property, rights, and credits with intent to delay, defraud, and hinder their creditors. The said debtors, in contemplation of insolvency, have made a payment and a grant, sale, conveyance, and transfer of their estate, property rights, and credits." There is no allegation in the petition that the debtors are or were at any time insolvent, nor is there any allegation that they have assigned or transferred all their property, and there is nothing in the petition to show when the alleged assignment took place, or to whom or what property was transferred. So far as appears, the assignment may have been of some property of insignificant value; and it may have been assigned long before the passage of the act, and the debtors may have been solvent when and after they made the assignment. Section 9 of the Insolvent Act of 1895 (Stats. 1895, p. 131) pro-

vides that an adjudication of insolvency may be made on the petition of five or more creditors. Such petition must set forth "that such person (the debtor) is about to depart from this state, with intent, etc.; or conceal himself to avoid the service of legal process; or conceals or is removing any of his property," etc. These are grounds for the adjudication without regard to the solvency of the debtor. The act proceeds: "On being insolvent, has suffered his property to remain under attachment or legal process for three days. . . . or has made any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, with intent to delay, defraud, or hinder his creditors." In these enumerated acts of the debtor the adjudication depends upon the fact of his "being insolvent." Without an allegation that he did the acts "being insolvent" there would be no sufficient ground alleged for the proceeding, and the petition in the present case rests in part upon the ground last above stated, and is copied from the act. The act proceeds: "Or in contemplation of insolvency, has made any payment, gift, grant, sale, conveyance, or transfer of his estate, property, rights, or credits." The complaint alleges "that said debtors, in contemplation of insolvency, have made a payment and a grant, sale," etc., following the language of the statute. There is nothing to show that these transactions were different from those previously alleged, for in neither case is the time when made, the person to whom made, or the property assigned set forth, or any other means of identification stated; and, so far as the petition shows, these latter transactions may have occurred years prior to the filing of the petition. We think the petition should have shown at least that the transfer was made since the passage of the insolvency act under which the proceeding was brought, if a date no more definite could have been stated, and should have contained some statement of the payment made or property transferred and to whom.

In re Patton, 110 Cal. 33, presented a similar question, but is not in point, for the petition there very properly alleged the insolvency of the debtors and also alleged the time when the transfer was made, to whom made, and the property transferred. The case of *in re Close*, 106 Cal. 574, also relied on

by respondent, was where the ground alleged was that the debtor had permitted his property to remain under attachment for over four days, and it was alleged that he was insolvent when the attachment was levied and has ever since so been, and that he had no other than the attached property. We do not think the petition was sufficient as against a general demurrer and certainly was obnoxious to the special demurrer.

2. Appellants make the point that the bond was insufficient, and that the court had no power to enter the judgment because the filing of the prescribed bond with the petition is jurisdictional. The petition was filed by certain four corporations and two copartnerships. The bond was signed by two sureties and by P. M. Daniel, J. M. Johnston, and A. B. Cass. Appellants claim that the signers of the bond must be petitioners. It was held in *Matter of Visalia City Water Co.*, 119 Cal. 561, that the "act contemplates the filing of the bond with two sureties and all the petitioning creditors as principals"; the bond was, therefore, insufficient. The objection to the bond is made here for the first time. It was said in *Creditors v. Consumer's Lumber Co.*, 98 Cal. 318, where the same objection was made as here, that "if the undertaking in this case was objectionable, in fairness to the other side the defects should have been pointed out in order that they might have been remedied." The question is unlike that in *Anderson v. Superior Court*, 122 Cal. 216, where there was no bond at all. It is not necessary to decide whether or not the filing of an insufficient bond is jurisdictional where no objection is made by the debtor to the bond as filed. In the present case there was a bond filed, and while we think it was insufficient in the particular already pointed out, the defect was waived by failure to make objection to it at the proper time and place.

It is advised that the judgment be reversed and the cause remanded.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

Harrison, J., Garoutte, J., Van Dyke, J.

[Sac. No. 508. In Bank.—December 7, 1899.]

CALIFORNIA SAVINGS AND LOAN SOCIETY, Respondent, v. F. D. CULVER, Administrator, etc., Appellant.

MORTGAGE—FORECLOSURE—MATURITY—ELECTION BY MORTGAGEE—STIPULATED DISMISSAL OF ACTION—STATUTE OF LIMITATIONS.—Under a mortgage providing for an election of the mortgagee upon nonpayment of interest for thirty days to treat the mortgage as due and to foreclose it, where a former action of foreclosure was dismissed by stipulation upon payment of all interest then due, in discharge of the default, and interest was thereafter paid for several years, the statute of limitations against a second action brought after maturity of the note does not begin to run from the commencement of the first action, but only from the maturity of the note.

ID.—PROVISION FOR BENEFIT OF MORTGAGEE—WAIVER OF PENALTY.—The provision for foreclosure by the mortgagee, at his election, upon default of interest, is for his benefit, and the mortgagor cannot claim that the note secured is due until its maturity. The mortgagee may waive the penalty for the default; and the bringing of a foreclosure suit does not put it out of his power to waive the penalty, by accepting a payment of all interest due and dismissing the action.

ID.—ESTOPPEL OF MORTGAGOR.—The mortgagor, having claimed that all interest was paid prior to the commencement of the first action, and afterward, upon payment of interest to the date of dismissal, having stipulated with the mortgagee for dismissal thereof, and having continued to pay interest thereafter, is estopped from setting up the statute of limitations as having run from the date of the first action against another action to foreclose the mortgage after maturity of the note.

ID.—CONSTRUCTION OF STATUTES OF LIMITATION.—Statutes of limitation are intended to prevent stale demands from springing up after long periods of time, and not as defenses to just demands of recent origin. They uphold defenses which are clearly within them, however unjust and unconscionable they may be; but, where the facts relied upon leave it greatly in doubt whether or not the case is within the statute pleaded, the court will not indulge in a strained construction in order to support it.

APPEAL from a judgment of the Superior Court of Shasta County. Edward Sweeny, Judge.

The facts are stated in the opinion of the court.

W. H. Cobb, for Appellant.

An absolute provision for maturity of a note in case of default in payment of interest entitles the defendant to plead the statute of limitations from the date when an action could have been brought. (*Hemp v. Garland*, 4 Q. B. 522; *National Bank v. Peck*, 8 Kan. 663; 3 Parsons on Contracts, 8th ed., 99, 100.) The election of the mortgagee was exercised by filing the first suit. (*Maddox v. Wyman*, 92 Cal. 674; *Clemens v. Luce*, 101 Cal. 432.) Limitation runs from the date of the exercise of the option for all purposes. (*Wheeler & Wilson Mnfg. Co. v. Howard*, 28 Fed. Rep. 741; *Moline Plow Co. v. Webb*, 141 U. S. 616.) Mere payment after the note was barred will not avoid the statute. (*Heinlin v. Castro*, 22 Cal. 103.) When the statute is set in motion nothing can interrupt it. (13 Am. & Eng. Ency. of Law, 731.)

J. F. Cowdery, and Robert Harrison, for Respondent.

Acceptance of interest by the mortgagor waived default and destroyed the cause of action upon it. (*Belloc v. Davis*, 38 Cal. 242; *Mason v. Luce*, 116 Cal. 232; *Richards v. Daley*, 116 Cal. 336; 2 Jones on Mortgages, par. 1186.) The cause of action is destroyed by such payment and waiver after action brought. (*Lawson v. Barron*, 18 Hun, 414.) A waiver of default by payment and acceptance of interest is enforceable against both parties. (*Alabama etc. Co. v. Robinson*, 56 Fed. Rep. 690, 693; *Bell v. Romaine*, 30 N. J. Eq. 25; *Sire v. Wightman*, 25 N. J. Eq. 102.) The dismissal of the action by stipulation upon payment of all interest due annulled the action, so that it must be regarded as if it had never been brought. (*Loeb v. Willis*, 100 N. Y. 235.) Defendants claimed that no interest was due when the suit was brought. If so, the action was not maintainable. The dismissal implies that the action was not maintainable. (2 Black on Judgments, 714.) The election having been revoked by the dismissal of the action and by waiver of all default, the statute of limitations can only run from the maturity of the note.

McFARLAND, J.—Action on a note and mortgage made and executed to plaintiff by the defendant Lake. The only defense is the four years clause of the statute of limitations applicable to written instruments. Judgment went for plaintiff, and the appeal is from the judgment, upon the judg-

ment-roll and a bill of exceptions by the owner of the mortgaged premises who got title, subject to the mortgage, through mesne conveyances from Lake, who does not appeal.

The note was for ten thousand dollars, was made and dated January 21, 1891—the mortgage being of the same date—and is, on its face, payable “three years after date.” This action was brought July 16, 1896, which was within four years after the maturity of the note, but appellant contends that the statute should be held to have run from the fourteenth day of March, 1892, which was more than four years before the commencement of the action. This contention is based upon the following facts: The note provides that the interest should be paid yearly upon the 1st of January, and that if not so paid it should become part of the principal; and, further, that if any part of the interest should not be paid within thirty days after the same should become due “then the whole of said principal and interest shall forthwith become due and payable, at the election of the holder of this note.” The provision of the mortgage on this subject is that if any interest shall remain unpaid for thirty days after due, then “said mortgage might be foreclosed by an action for that purpose brought, without demand or notice to defendant of election to consider the mortgage due.” On said March 14, 1892, plaintiff brought an action against Lake to foreclose for the whole amount of the principal and interest, upon an averment in the complaint that the interest due January 1, 1892, had remained unpaid for more than thirty days. Summons was served on Lake, who did not answer or appear in time, and his default having been entered a judgment of foreclosure was rendered. Afterward, in November, 1892, Lake made a motion to open the default in the action and to set aside and vacate the judgment; and he based his motion upon an affidavit made by himself, in which, among other things, he stated that he had paid the interest due, that for various reasons given the default was improperly taken against him, and that he had “a good and substantial defense to this action on the merits thereof.” The affidavit closed with a prayer “that the said judgment may be set aside and said default opened, and this defendant be allowed to answer on the merits to said complaint, and that said action may be dismissed.” Afterward, the

plaintiff filed a written paper in the case whereby he "consents to said default being opened, and to judgment vacated, and the action dismissed without prejudice to a new action, each party to pay its own costs." Thereafter the court made the following order: "Upon reading and filing the stipulation of the parties consenting thereto, it is hereby ordered that the default of said defendant, heretofore taken in said cause, be set aside, and the judgment heretofore rendered be vacated, and that said action be dismissed without prejudice to a new action, each party to pay its own costs." The court found that on "September 21, 1892, all the interest in default at the time of the institution of said action and all interest due or payable on said promissory note up to said September 21, 1892, was, by the then legal holder and owner of the premises by said mortgage conveyed, paid to plaintiff, and by plaintiff received in full discharge of said default, and with and under the agreement that said action of March 14, 1892, should be dismissed, and the time of payment of said promissory note and the moneys therein mentioned be and remain as by the terms of said promissory note expressed." This finding is sustained by the evidence. Thereafter and up to January 1, 1896, all interest on the note was paid as it became due by the holder of the legal title of the mortgaged premises, and about two thousand dollars of the principal was also paid. This present action was brought to recover the balance due upon the principal, together with interest from January 1, 1896. The contention of appellant is that, notwithstanding the above facts, the whole of the principal and interest of the note unpaid was barred in four years from the commencement of the first suit. We do not think that this contention can be maintained.

Statutes of limitation are intended to prevent stale claims from springing up after the lapse of long periods of time, to the surprise of parties, or their representatives, when loss of papers, deaths of witnesses, and worn-out recollections make the presentation of the actual facts in the case impossible or extremely difficult, and are not intended as defenses to just demands of comparatively recent origin; still, as such statutes must necessarily fix definite periods of time, they uphold defenses which are clearly within them, however unjust

and unconscionable such defenses may be. But where, in cases like those last mentioned, the facts relied on leave it greatly in doubt whether or not the defense is within the clause of the statute pleaded, a court will not indulge in a strained construction in order to support it. This rule is always observed. It is stated in 13 American and English Encyclopedia of Law, page 692, as follows: "It is important to keep clearly in mind the double aspect of statutes of limitations, first, as an obstacle to just claims, and, secondly, as an aid to just defenses which have been rendered uncertain by the moldering effects of time." In the case at bar, appellant says that the statute commenced to run on March 14, 1892, when the first suit was commenced; and he bases his whole contention upon the asserted rule—which is frequently reiterated in the briefs—that when the statute is set in motion it never ceases to run. This rule has, no doubt, been frequently declared, in general terms, in judicial opinions and text-books. But it will usually be found to have been used as stating the two propositions that when the statute has begun to run no subsequently accruing disabilities can interrupt it, and that one disability cannot be tacked on to another. In 13 American and English Encyclopedia of Law, page 732, it is said: "These two rules, together with the preliminary one that when the statute is once in motion nothing interrupts it, are merely different forms of statement of a single principle, already stated, that after the statute is under way no subsequently accruing disabilities can in any way affect it." And, as instances of the rule, it has been held that (when there is no statute to the contrary) if a man dies even one day after his cause of action accrues, and leaves infant heirs, the latter's disability of infancy does not avail; that if a woman is an infant when her right accrues, and before she comes of age marries, becomes insane, and dies leaving infant heirs, no one of these subsequent disabilities is material; and that where a plaintiff was insane when his cause of action accrued, but recovered his sanity for a period, and then relapsed into insanity, the statute was set in motion by his sanity, and his relapse did not stop its running. These considerations are, perhaps, not very important in the case at bar; but, since the rule is so confidently relied on here, it is proper to look somewhat to the reason

which underlies it and the extent to which it goes. In the case at bar, plaintiff is not seeking the aid of a subsequently accruing disability, or of any disability whatever.

But, whatever the full meaning of the rule above noticed may be, it clearly has no applicability until after the statute has begun to run. When did it begin to run in the case at bar? That is, when did it begin to run against the cause of action upon which this present suit is based? Appellant contends that the commencement of the first action in March, 1892, set the statute in motion. It is somewhat of a solecism to say that the commencement of the action starts the statute of limitations, for the general rule is that the bringing of the suit stops the running of the statute. (13 Am. & Eng. Ency. of Law, 746, and cases there cited.) It is meant, however, we suppose, that the bringing of the suit in 1892 was a declaration by plaintiff of his election to consider the whole amount of the note due. It has been definitely settled, however, in this state that even where it is expressly declared on the face of the note that upon default in the payment of any interest the whole principal shall become immediately and absolutely due, still such a clause is a mere penalty for the benefit of the payee or holder which he may waive by accepting interest after due, and that the statute in such a case does not begin to run until the principal becomes due according to the terms of the note. (*Belloc v. Davis*, 38 Cal. 242; *Mason v. Luce*, 116 Cal. 232; *Richards v. Daly*, 116 Cal. 336.) And where, as in the case at bar, the provision of the note is that upon a default in paying interest the principal shall become due at the election of the holder, there the assertion of such election merely puts the holder in the position of the holder of a note which upon its face declares, in the first instance, that upon default in interest the whole principal shall immediately become due. And the declaration of plaintiff's election by bringing the first action did not put it out of his power to waive the penalty, which he did by accepting the interest and dismissing the action. He still had the same power to waive the penalty which he would have had if the note—as in the cases above cited—had originally provided for the maturity of the principal upon default in paying any interest. In 2 Jones on Mortgages, section 1183, it is said: "When a mortgagee has made his election to recover the principal sum due under a stipulation that he shall have this

election upon the nonpayment of interest for thirty days after it becomes due, he cannot be compelled to waive this provision and accept the interest. Undoubtedly, the unconditional acceptance of the interest in default would be a waiver of the default"; and in *Lawson v. Barron*, 18 Hun. 414, and in *Langridge v. Payne*, 2 Johns. & H. 423, cited in support of the text, the principle was applied where the interest had been accepted after suit to foreclose had been commenced. Appellant has cited one or two cases where the court, after the real questions involved in this case had been disposed of, said, by way of *dictum*, that it would have been otherwise if the plaintiff had elected to consider the principal due; but as in those cases the judicial mind was not directed to the question as one before the court to be determined, the expressions used have little weight as authority. Moreover, the cause of action in the case at bar was not, as in the first action, a failure to pay the first year's interest, but was a failure to pay the principal then due according to the terms of the note, with some interest which accrued in later years, and against this cause of action, under the circumstances of this case, the statute of limitations had not commenced to run before the maturity of the note.

Moreover, the appellant is estopped by his acts and those of his predecessors in interest, as above stated, from setting up the statute of limitations in this case; and to allow him to do so would be to allow him to practice a fraud upon the plaintiff. If plaintiff had commenced the first action when no interest was really due, and had been compelled, for that reason, to dismiss it or to allow judgment against him, no one would claim that the provisions of the note had been in any way changed. And the same result follows from the facts that Lake, in his motion to open the default, stated in his affidavit that such interest had been paid and accepted, that he prayed to have the action dismissed for that reason, and that for such reason by consent and stipulation of both parties the action was by the court dismissed. These facts bring the case entirely within the principles upon which estoppels are founded.

The judgment appealed from is affirmed.

Van Dyke, J., Temple, J., Harrison, J., Garoutte, J., and Henshaw, J., concurred.

1897, requested the administrator to take said stock, which was then tendered to him, and pay plaintiff fifty cents per share, which was the first demand made by plaintiff upon the administrator.

On the same day plaintiff presented to the administrator for allowance his claim for the said sum of five hundred dollars, which claim was verified on the eighth day of February, A. D. 1897, as a claim for money due.

A copy of the contract was attached to the claim, and the same included an offer to surrender the certificates of stock, duly indorsed in blank by Smith, in the same condition in which plaintiff received them from the deceased. The claim was rejected by the administrator on the said twelfth day of February, A. D. 1897. This suit was commenced more than two months after that time.

Upon this the first point logically in order arises. Respondent, to sustain the judgment, contends that the money was not due until after demand was made, and being a claim for money not due (1) was not presented as required by section 1494 of the Code of Civil Procedure, because the particulars of the claim are not stated. I think the particulars are stated. (2) That being in fact a claim not due, suit should have been brought within two months after its rejection under section 1498 of the Code of Civil Procedure. That section declares that suit must be brought "within three months after the date of its rejection, if it be then due, or within two months after it becomes due." It is argued that this claim became due, if at all, upon demand by presentation, and suit should have been brought within two months.

There are two quite conclusive answers to this contention: 1. If a claim is one which would become due upon presentation, it is a claim then due within the meaning of this statute; and 2. The provision that when the claim is not then due suit shall be brought within two months after it becomes due was manifestly not intended to shorten the time allowed for the commencement of an action, but to extend it. The statute itself makes this obvious.

The next contention is that the amount of fifty cents per share was not due when Maurer verified his claim, because he had not then tendered the stock to the administrator, and had

not made his demand for the money. It does not strike me that there is any merit in this contention. Demand could not have been made upon J. W. Smith, for he was dead. It was useless to tender the stock to the administrator and demand payment, for he could not pay until the claim had been allowed. The presentation of a claim to an administrator is in many respects analogous to the commencement of an action, but there are some differences, and one difference is important here. One may not maintain an action on a claim which will become due only on demand, until demand has been made, because it is unjust to subject a defendant to costs until he has neglected or refused to perform his obligation, but the administrator not only cannot perform on demand, but the mere presentation of a claim for an allowance does not subject the estate to payment of costs. And then, in reality the requirements that claims must be presented before suit can be brought is the statutory mode, as well as the statutory requirement for making demand upon an estate.

It is also contended that the claim was presented too late because it was not presented until four days after the stipulated period of two years had elapsed. Respondent cites section 1490 of the Civil Code, which reads: "Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before or afterward." The contract in question imposed no obligation upon plaintiff within the meaning of that section. Maurer had paid the consideration for the contract, but Smith had not fully performed. The stipulated two years was not a period within which Maurer was bound to do anything. It was an extension of credit to Smith. Within that time Smith could not be compelled to pay the five hundred dollars in lieu of the stock. No doubt Maurer was bound to exercise his option within a reasonable time after the expiration of the credit, and he certainly did do so. The condition is not, however, "if he requests at the end of two years," but, "if he holds said stock at the end of two years and requests." As already stated, the period was a credit to Smith and was fixed only for that purpose, and there was no express requirement that Maurer should make his request at the end of the period, but that he could not make it sooner.

It is also contended that the contract is void as a contract

to deliver stock at a future day, under the provisions of section 26, article IV, of the constitution: "All contracts for the sale of shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, shall be void."

This provision of the constitution has been considered in several cases by this court. (*Cashman v. Root*, 89 Cal. 373; 23 Am. St. Rep. 482; *Sheehy v. Shinn*, 103 Cal. 325; *Kullman v. Simmens*, 104 Cal. 595.) These cases establish the proposition that the constitutional policy was to prohibit wagering contracts in regard to the future market value of stocks—"dealing in futures," such transactions have been sententiously called. As explained in *Sheehy v. Shinn*, *supra*, these contracts take various forms, one of them being margin sales. Others are variously called by brokers "puts," "calls," "options," etc. In all cases the customer (if the deal is with a broker) pays and risks something for the purpose of securing a profit from an expected rise in the market value of stocks. Often no actual purchase is contemplated, but settlements are made according to market rates.

It has been held that this constitutional inhibition cannot be evaded by varying the form of the contract. If it be in reality a wagering contract of the character denounced, it is void. It is not so easy to hold the converse of this proposition, that whenever the transaction was but an ordinary business operation with no intent to gamble in futures, it will be upheld. That would tend to destroy the constitutional policy, and, so far as intent is material, it goes only to the intent to do the act prohibited. The acts plainly prohibited are sales of stock on margin and contracts for the future delivery of shares of stock.

But the provision is highly penal and greatly obstructs legitimate business transactions. A large amount of property is now owned by corporations, and the daily business transactions of the community naturally involve sales or agreements to sell corporate stock. While, therefore, courts must enforce the constitutional policy, contracts which are neither prohibited by the letter of the inhibition nor evasions of it will be upheld. The restriction will not be extended by construction.

In the present case there was no contract for the delivery of stock at a future day. The transaction was not a wager

as to fluctuations in the market value of stock. The stock was delivered to Maurer as a conditional payment, or as payment with a guaranty. One thousand shares of stock were given in payment of the sum of five hundred dollars, with a guaranty that Maurer would be able to get that sum for it within two years. If he did not realize that sum within two years Smith would take the stock back and pay him five hundred dollars in cash.

Perhaps this form of contract could be used to effect a prohibited transaction. If such were the case, and the intent was made to appear, it would be declared an attempt to evade the prohibition and be unlawful. It is to be regretted that public policy requires this restriction upon business transactions, many of which are perfectly proper and would not really be within the evil which it was intended to remedy. Persons, other than stock dealers, are likely to do the very thing prohibited without knowing that it is wrong and unlawful and without intending to wager as to future values. But whether public interests require this drastic provision, so likely to interfere with legitimate business, and often to serve as an instrument for oppressing the unwary, is not for the courts.

The case is remanded with directions to the trial court to set aside the judgment and to enter judgment for the plaintiff, to be paid in due course of administration.

Henshaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

[Sac. No. 578. Department Two.—December 8, 1899.]

MARY ELLA SMITH et al., Appellants, v. PATRICK HAWKINS, Respondent.

WATER RIGHTS—APPEAL FROM JUDGMENT—SUBORDINATE RIGHTS—APPELLANTS NOT INJURED.—Upon appeal by plaintiffs from a judgment which establishes their prior right, by appropriation only, to one hundred and eighty inches of water measured under a six-inch pressure, and establishes the subordinate rights of the defendant as an appropriator to one hundred inches of water, and as a riparian proprietor to the flow of the remainder of the stream, the appellants are not concerned in the question as to how the rights of the

defendant shall be measured, and as to whether there is a want of certainty on that question in the judgment and findings, and cannot be injured or entitled to a reversal of the judgment for want of such certainty.

APPEAL from a judgment of the Superior Court of Nevada County. Stanley A. Smith, Judge, presiding.

The facts are stated in the opinion.

P. F. Simonds, and A. Burrows, for Appellants.

C. W. Kitts, for Respondent.

CHIPMAN, C.—Action to quiet title to certain water and ditch rights. Plaintiffs had judgment, from which they appeal on the judgment-roll alone. There is no brief by respondent on file. Appellants complain that there is a want of certainty in both the judgment and findings “in not fixing by any known method of measuring the amount of water defendant is entitled to take from Wolf creek.” (Citing *Riverside Water Co. v. Sargent*, 112 Cal. 230.) And also because the judgment “ignores the rule that the right of defendant is limited to the one hundred inches of water which it is found the defendant has appropriated to a useful purpose.” (Citing *Senior v. Anderson*, 115 Cal. 497.)

The answer alleged “that defendant is the owner of lot 25, through which the creek runs, and of all dams, ditches, and water rights thereon”; and “that he is the owner and has a prior right to so much of the water as will supply his ditch with a capacity of five hundred inches, measured under a six-inch pressure.”

The findings and judgment award to plaintiffs a prior right to one hundred and eighty inches, and to defendant one hundred inches, measured under a six-inch pressure, “subject to such prior right of plaintiffs; . . . that defendant is the owner as riparian proprietor, subject to the prior right of plaintiffs aforesaid, to all the water of said Wolf creek.” Plaintiffs express themselves as satisfied with the findings and judgment to this point. But they complain: 1. Of the conclusion of law “that defendant is entitled, as appropriator and riparian proprietor, to have the balance (i. e., the

water remaining after plaintiffs receive their one hundred and eighty inches) of the waters of said creek flow onto and over lot 25, as described in the manner herein"; and 2. To the judgment "that the defendant is the owner as riparian proprietor, subject to the prior right of plaintiffs aforesaid to all the waters of said Wolf creek." We are asked to strike this latter clause from the judgment.

It is manifest that defendant gets no rights whatever except subordinate to plaintiffs' right. He can take no water at all, either as an appropriator or riparian proprietor until after plaintiffs have received the one hundred and eighty inches awarded them. When plaintiffs have had their portion we cannot see that it concerns them by what method defendant measures to himself the one hundred inches awarded to him as an appropriator. Plaintiffs make no claim as riparian proprietors, and we cannot see that they are injured by the findings or judgment as to defendant's riparian rights. Defendant alleged enough in his answer to raise an issue as to his riparian rights, and we must presume that the evidence justified the findings on this appeal. The court had, just previously to the clause last above quoted, adjudged that defendant, "aside from his riparian rights, is the owner of the right to the use of one hundred inches of the waters of said creek, and no more, measured under a six-inch pressure, miner's measure, to the extent of the use of the same from May 1st to October 1st of each year; . . . subordinate to the said rights of said plaintiffs."

Reading this latter provision in connection with the clause which plaintiffs ask to have stricken out, the judgment gives defendant one hundred inches as an appropriator and the remaining water as a riparian proprietor, but both rights are subject to plaintiffs' prior right to one hundred and eighty inches at all times. We may fail to clearly understand plaintiffs' point, but, so far as we are able to discover, they cannot possibly be injured by the judgment.

The judgment should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Henshaw, J., Temple, J., McFarland, J.

[Sac. No. 676. In Bank.—December 8, 1892.]

PHILIP KRAMM, Appellant, v. A. R. BOGUE et al, Respondents.

SCHOOL DISTRICT—DIVISION BY ENLARGED CITY BOUNDARIES—ANNEXATION FOR SCHOOL PURPOSES—CONSTRUCTION OF CODE.—Section 1576 of the Political Code, providing for the annexation by the supervisors for school purposes of the remainder of a school district divided by the organization of an incorporated city or town, upon petition of the majority of the heads of families residing therein, is to be liberally construed, as permitting such annexation where a district is divided by the reincorporation of a city or town with enlarged boundaries.

ID.—RIGHTS OF PUPILS IN ANNEXED SCHOOL DISTRICT—REGISTRATION.—

Pupils resident in the remainder of the school district, which has been annexed by the supervisors to a city for school purposes, are entitled to attend the public schools of the city, though not residents of the city, in the order of their registration, which must be made by the board of education.

ID.—EQUITABLE GROUND FOR ANNEXATION—CONVEYANCE OF SCHOOL

PROPERTY TO CITY.—The conveyance to the city of school property of great value in the remainder of the divided school district, including the schoolhouse situated therein, in consideration that all the residents of the district shall have the rights and privileges of the public schools of the city, even if such contract was not valid, affords a strong equitable ground for the exercise by the supervisors of their power to annex the remainder of the district to the city for school purposes.

ID.—RESULT OF ANNEXATION—APPLICATION OF PUPIL—CONSENT OF

TRUSTEES.—The result of the annexation to the city of the remainder of the school district for school purposes is to destroy it as a separate school district, and there being no trustees thereof, their consent is not required to an application of a pupil to attend the public schools of the city.

ID.—AMBIGUITY OF COMPLAINT—RESIDENCE OF PUPIL—GENERAL DE-

MURRER.—A complaint by a parent to establish the right of his son to attend the public schools of the city, which avers that when the demand was made he was a resident of a city school district, and which also avers that he was and is residing in the former school district by its name, which it is further alleged became and is a part of the city school district by the alleged action of the board of supervisors in annexing it for school purposes, is not misleading, nor subject to a general demurrer.

APPEAL from a judgment of the Superior Court of San Joaquin County. Edward I. Jones, Judge.

The facts are stated in the opinion.

Nicoll, Orr & Nutter, for Appellant.

J. G. Swinnerton, and E. R. Thompson, for Respondents.

HAYNES, C.—The defendants constitute the board of education of the city of Stockton, and this action was brought to have it adjudged that plaintiff's son, Frederick W. Kramm, aged eleven years, is entitled to the privileges and benefits of the public schools of said city, and to require the defendants to admit him thereto. Defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff electing to stand upon his complaint, judgment was entered against him, and from that judgment he appeals.

An outline of the facts shown by the complaint may be briefly stated as follows: Prior to the reincorporation of the city of Stockton in 1870 there was a school district adjacent to the city, known as North school district. By the act of reincorporation a portion of said district was added to and became part of the city, the added territory including certain real estate, the property of said North school district. In 1872 an act was passed "to provide for the settlement of the value of school property in the several school districts that were adjacent to the city of Stockton, and which was, by act of the legislature, approved January 26, 1870, included within the limits of said city." (Stats. 1871-72, p. 530.)

In March, 1882, the trustees of said North school district conveyed to the board of education of the city of Stockton its school property described as the south half of block 147 in said city, "in consideration that the residents of all that territory known as North school district, in said county, shall forever have all the rights and privileges of the public schools of the city of Stockton," said property to be held in trust for the use of the public schools of said city. In said conveyance said North school district further agreed that all the school money thereafter apportioned to said North school district should be paid to said board of education. The property so conveyed is alleged to have been then of the value of ten

thousand dollars, and now of the value of thirty thousand dollars; that the school funds apportioned to said district have been ever since paid to the board of education; that on said land so conveyed there was at that time a schoolhouse in which was conducted the public school of said district, and from that time until the exclusion of plaintiff's son the children of the residents of said North district enjoyed the privileges and benefits of the city schools.

The plaintiff further alleged that on April 5, 1897, a petition was duly made and presented to the board of supervisors of the county of San Joaquin praying that all that part of said North district which was not included in the corporate limits of the city of Stockton be annexed to said city for school purposes only; that said petition was signed by a majority of the heads of families residing in said portion sought to be annexed, and that said board of supervisors, at a regular session held on said fifth day of April, 1897, by an order duly adopted, made, and passed, did annex to said city, for school purposes only, all of said remainder of said North district, and that the same ever since has been, and is now, part of the school district of the city of Stockton; that on October 24, 1898, plaintiff applied to said defendants for the admission of his said son to the schools of said city and that his said application was refused for the alleged reason, and none other, that this plaintiff and his said child did not reside within the corporate limits of the city of Stockton, and that his said child has ever since been excluded from said schools wrongfully and unlawfully, for the reason aforesaid, and not otherwise.

Respondent contends that it does not appear that plaintiff's child has been deprived of any school privileges, in that it does not appear "that he has been prevented from attending a public school."

If, as alleged, the plaintiff and his son reside in Stockton school district, plaintiff had a legal right to have his child attend the schools in that district, and it will not be presumed that by some special arrangement he was permitted to attend a school in a district in which he did not reside. Besides, the refusal of defendants to admit him to the Stockton schools was not based upon any such reason, but was based upon the ground that he was not a resident of the city of Stockton; but

if, being a resident of Stockton district, any reason existed which justified the refusal to admit him, it was a matter of defense not proper to be anticipated in the complaint.

It is also contended that no proper application to be admitted is shown by the complaint to have been made; that the application must be made to the teacher of the school; that the scholar must be registered and admitted in the order in which applications are made. The Political Code, section 1683, is cited to this point. That section only provides that "pupils must be admitted to the schools in the order in which they are registered." It does not provide that the application shall be made to the teacher; but the Political Code defines the powers and duties of trustees of school districts and of boards of education in cities, and makes it their duty "to keep a register, open to the inspection of the public, of all children applying for admission and entitled to be admitted into the public schools, and to notify the parents or guardians of such children when vacancies occur, and receive such children into the school in the order in which they are registered." (Pol. Code, sec. 1617, subd. 14.) It is the pupils thus registered by the board of education which the teacher must receive "in the order in which they are registered."

It is not necessary now to consider or decide whether the contract of March 27, 1882, contained in the conveyance made by the trustees of North school district to the board of education, was within the power of said trustees and board, either under the general statute or under the act of 1872. If the action of the board of supervisors in adding the remainder of said North district to the city for school purposes was authorized and regular, the plaintiff was entitled to the relief prayed for, whether the same right existed under said contract or not; but if it be assumed that said contract was invalid and conferred no legal right upon the inhabitants of that portion of the original district which is now outside of the corporate limits of the city to send their children to the city schools, it nevertheless furnished a strong equitable ground for the action of the board of supervisors, in annexing it to the city for school purposes. That, however, is not sufficient to sustain their action, if such annexation is not authorized by law. Section 1576 of the Political Code, so far

as material here, is as follows: "Every city or incorporated town, unless subdivided by the legislative authority thereof, shall constitute a separate school district, which shall be governed by the board of education or board of school trustees of such city or incorporated town; provided, that whenever a city or town shall be incorporated the board of supervisors of the county may annex thereto, for school purposes only, the remainder, or any part of the remainder, of the district or districts from which such city or incorporated town was organized whenever a majority of the heads of families residing therein, as shown by the last preceding school census, shall petition for such annexation."

Respondent contends that "this section does not, in terms, apply to cities already incorporated." This construction is too narrow. North school district was wholly outside of the incorporated city of Stockton until said city was reincorporated with enlarged boundaries which included a part of said district. As to the added territory, it was a new corporation then first formed. It is obvious that a division of a school district, by adding a portion of it to an adjacent municipality, produces precisely the same conditions which would be created by the incorporation of a new city or town which divided the same district in the same manner. The conditions being the same in each case, the remedy is appropriate. This provision of the code, as well as all others, "are to be liberally construed with a view to effect its objects and to promote justice." (Civ. Code, sec. 4.) "The letter of remedial statutes may be extended to include cases clearly within the mischief they were intended to remedy, unless such construction does violence to the language used." (Sutherland on Statutory Construction, sec. 348.)

The case of *Bay View School Dist. v. Linscott*, 99 Cal. 25, cited by respondent, has no application here. It involved no question as to the power of the board of supervisors to annex territory for school purposes.

This action of the board of supervisors was not a change of boundaries of school districts under section 1577 of the Political Code, as suggested, and the provisions of the code relating thereto do not apply.

It is also said that the trustees of North school district are

not alleged to have consented to the application of plaintiff's son to attend the schools of Stockton school district. All that remained of North district having been annexed to the city for school purposes, there was thereafter no North district nor any trustees of it. Under the allegations of the complaint the plaintiff, when he made the demand that his son be admitted to the Stockton school, was a resident of Stockton school district. It is true, as said by respondent, that in the second paragraph of the complaint it is said that the son, Frederick, during said time, and is now, residing in North school district. The evident meaning is that he was and is now residing in what was North school district. Afterward, in the tenth paragraph, after alleging the said action by the board of supervisors, it is alleged that "all of said remainder of said North school district ever since has been and is now a part of the said school district of the city of Stockton." No one, we think, could be misled by said allegations, or misunderstand the plaintiff's case. Such faults in pleading are not reached by a general demurrer.

I advise that the judgment appealed from be reversed, with directions to the court below to overrule the demurrer to the complaint.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed, with directions to the court below to overrule the demurrer to the complaint.

McFarland, J., Beatty, C. J.,

Van Dyke, J., Garoutte, J.,

Henshaw, J., Harrison, J.

[S. F. No. 1899. Department Two.—December 9, 1899.]

In the Matter of the Estate of G. B. MARRE, Deceased. G. GINOCCHIO, Administrator, Appellant, v. ROSE D. COFFMAN et al., Respondents.

ESTATES OF DECEASED PERSONS—SETTLEMENT OF ADMINISTRATOR'S ACCOUNT—INTEREST.—An administrator cannot be charged with interest on money in his hands, unless it is shown or presumed that he has profited thereby, or has been guilty of such willful misfeasance as to justify the court in requiring compensation therefor.

ID.—PENDENCY OF ACTION AGAINST ESTATE—NEGLIGENCE.—If, at the time of the settlement of the first account of the administrator, an action was pending against the estate of the decedent as trustee for an amount in excess of the money on hand, and no willful negligence appears in the prosecution or settlement thereof until after the filing of his second account, he cannot be charged with interest from the date of his first account, but only from the date of any actual dereliction in duty, which may be shown to have caused loss to the estate.

ID.—APPEAL BY ADMINISTRATOR—BILL OF EXCEPTIONS—UNSUPPORTED STATEMENTS—DUTY OF ADMINISTRATOR.—Facts stated in the settled bill of exceptions of an administrator used upon his appeal from an order settling his account must be accepted as true, for the purposes of the appeal. If any of them consisted of unsupported statements of counsel, it was the duty of the administrator to have that fact made to appear in the bill of exceptions.

ID.—ORAL OBJECTIONS TO ACCOUNT—WAIVER.—The requirement that the objections to the administrator's account shall be made in writing is waived by the administrator, where the hearing was had upon oral objections made in his presence, and in the presence of the court, without any demand that they be reduced to writing.

APPEAL from an order of the Superior Court of the City and County of San Francisco settling the accounts of an administrator. J. V. Coffey. Judge.

The facts are stated in the opinion of the court.

Thomas F. Bachelder, for Appellant.

Timothy J. Lyons, T. C. Judkins, and A. Ruef, for Respondents.

THE COURT.—The administrator appeals from an order charging him with interest, on settlement of his second account, from the date of the settlement of his first account.

In his second account, which was filed February 16, 1898, after an order of the court had been made to show cause why he should not make the account, the administrator charged himself with seven thousand nine hundred and seventy-nine dollars and seventy-nine cents balance cash on hand from last report. The first account was settled July 28, 1891. In the second account, which is duly verified, the administrator makes a statement explanatory of his failure to close the estate; that on January 18, 1891, an action was commenced against him, as administrator, in the superior court of the city and county of San Francisco, for an amount in excess of the funds in his hands belonging to the estate, and that the suit was still pending; that it had been several times set for hearing at his request, and at the time of filing the account was set down for hearing February 23, 1898. Some few items of expenditures, since the settlement of the first account, were allowed and the account was settled, showing a balance of cash on hand of seven thousand six hundred and thirty-seven dollars and twenty-one cents, and the court charged the administrator with legal interest on this balance from July 28, 1891, amounting to three thousand four hundred and thirty dollars.

When the account came on to be heard, on February 28, 1898, the day fixed for the hearing, the attorneys for the heirs at law being present, the hearing was continued to March 14th, and again to March 16th, on which last day the attorneys for the heirs made certain oral statements by way of objections to the account and report. They claimed that the administrator should be charged with interest from July 28, 1891, and in support of the claim stated that the first account as settled showed that all the debts and expenses and charges of administration had been fully paid, and that the only necessity for not closing the estate was the pendency of the lawsuit referred to above; that no proper efforts had been made by the administrator to bring the case to trial, which he could have done by due diligence, and that the continued excuse of the administrator of the pendency of said suit showed bad faith and a desire to avoid the final settle-

ment; that the report failed to show what, if anything, the administrator had done toward the investment of the money held by him or to give any explanation for the long delay in bringing said action to trial. The bill of exceptions then shows that, upon the foregoing objections being made, the administrator, by his attorney, denied all intentional delay in the trial of said cause, and claimed that he had been making efforts to compromise the action; that the cause was set for trial February 23d, and had not been reached on the calendar; that he was not bound to make further explanation or report, or to do more than charge himself with the balance of the money in his hands, which he had done. The hearing was thereupon placed on the reserved calendar, to be restored for further hearing upon motion of the administrator or any of the heirs represented by their attorneys; and later, upon motion of the heirs, the hearing was fixed for November 23, 1898, and was regularly continued to December 5, 1898, when the account came on to be heard, all parties being represented by attorneys. The bill of exceptions then proceed as follows: "The heirs, by their aforesaid attorneys, announced that they desired the account to be then and there finally heard, and the administrator's liability to the estate fixed and adjudicated. They thereupon showed to the court by the records of said estate and the matters and things which appeared to the court, as per settlement of the first account, and the administration thereof since said time, that upon the settlement of the first account there was no necessity for the further administration of said estate except the fact of the existence of the suit against the administrator aforesaid"; that the said suit had not been brought to trial by the administrator notwithstanding six months had elapsed since the last continuance of the hearing of this account; that during this intervening period the heirs had arranged a compromise of said suit with the plaintiff therein for the sum of one thousand dollars, conditioned upon its immediate payment by the administrator, subject to the approval of the court; that the administrator was urged by the heirs to pay this amount; "that said administrator, in reply to the demands of said heirs, admitted (as he had previously thereto) that he had no money of said estate in his hands with which to pay said compromise sum

of one thousand dollars"; that about July 3, 1898, said administrator had prepared a petition, which was in the hands of the heirs, praying the order of the court for authority to pay said sum in compromise of the suit, and that after signing and verifying the petition he asked that it be not filed for a few weeks, promising that within that time he would secure the money to compromise said suit; that he then left the state; that the heirs had written him demanding the settlement of the suit and the settlement of his account, but that he has taken no action touching such matters; that the heirs are still able to compromise the suit for one thousand dollars if the administrator should be ordered to effect the compromise; that since the heirs made their objections at the hearing, March 16, 1898, the administrator had made no offer to change or modify his position then taken that he was not called upon to do so. The bill of exceptions shows that "the matter was submitted by the administrator and the heirs without further proceedings, no objections being made or suggested by any person."

1. Appellant now claims that the foregoing statements were not established by any evidence, but were nothing but statements made by the attorneys of the heirs at the hearing, and that there was no evidence whatever submitted to establish these statements. The bill of exceptions states that the heirs "showed to the court" by the records and "the matters and things which appeared to the court, as per settlement of the first account, and the administration thereof since said time," the facts which we have summarized. If there was no evidence to support these statements, it was the duty of the administrator to object to their thus going into the bill. He complains that they were all inserted by way of amendments, and that the court had no right to include this matter because they were but unsupported statements of counsel at the hearing. This should have been made to appear in the bill of exceptions if such was the fact. On the contrary, the judge certifies to the correctness of the bill as the administrator's bill of exceptions, and the hearing was had on what purports to be a summary of the evidence as now certified to us without objection. Under these circumstances, we must treat the bill as correctly setting forth what occurred. (*Hyde v. Boyle*, 89 Cal. 590.)

2. Appellant further contends that the objections to the account cannot be considered because they were not made in writing, citing section 1635 of the Code of Civil Procedure and *Estate of More*, 121 Cal. 635, where it was held that in contesting an administrator's account the contestant must file his exceptions thereto in writing, stating specifically the grounds of his objections, and at the hearing should be held limited to the exceptions so presented. The court laid down this salutary rule, while at the same time stating that it is the duty of the court to carefully examine the account and reject all unjust or illegal claims, whether or not exceptions are filed. If appellant had objected at the hearing to the method of procedure allowed by the court, and had demanded that the contestants reduce their objections to writing and file the same, and that the administrator be given time to answer, we do not doubt the court would have required contestants to comply with the rule of practice prescribed in the case cited. But he went into the hearing some time after the oral objections were made in his presence and in the presence of the court, and at no time objected on the ground now urged, and we must presume that he waived written objections.

3. The more serious question is, whether the evidence justified the court in charging the administrator with interest from the date of his first account. "Whether in any instance the executor is chargeable with even simple interest must be determined by the trial court from all the circumstances of that case. It cannot be said, as matter of law, that interest is to be added to the value of the property that has been lost by his neglect" (*Wheeler v. Bolton*, 92 Cal. 159, 173); again it was there said: "The rule charging him with interest is, however, limited to cases in which it is either shown or presumed that the executor has himself profited by his acts, or has been guilty of such willful misfeasance as to justify the court in requiring compensation therefor."

Looking to the bill of exceptions, which purports to bring up all the facts on which the court based its order, we find that at the time the first account was settled, July 28, 1891, the estate consisted entirely of money in the administrator's hands, and that there was pending against him as such ad-

ministrator a suit demanding more than this amount on an alleged trust indebtedness of his intestate; that he had made efforts to bring the cause to trial several times in the interval between the filing of the first and second accounts. The facts submitted by the contestants were that after the second account was filed, which was February 16, 1898, they made demand that he should urge this pending suit to trial and that he neglected to do so; that during the period intervening between the filing of the second account and its hearing the heirs had arranged a compromise of the suit upon payment of one thousand dollars subject to the approval of the court, and the administrator was urged to pay this amount, but failed to do so and said he had no money of the estate to pay said sum. It appeared, however, that he prepared a petition to the court asking authority to make the compromise, which was withheld at his request to give him time to get the money, and thereupon he left the state, and although written to by the heirs had failed to take "action touching said matters." There is no evidence tending to dispute the report of the administrator, under oath, that he had made efforts to bring the pending suit to trial except as to his neglect after he filed his second account; there is no evidence tending to show willful neglect of duty during all the years following his first account commencing at its date. We do not see upon what principle or upon what facts shown he can be charged with interest from the date of his first account. Because he was derelict after he filed his second account, willful neglect and misfeasance cannot be presumed for the entire period of his administration after the first account was filed. It may be that the failure to bring to trial the suit pending against him was due to his fault or connivance in order to retain the use of the money in his hands, and that the delay in the settlement of the estate was due to his misconduct or negligent management of the estate; but before he should be charged with interest for these earlier years of his administration there should be some evidence to justify it. It was said in *Estate of Sarment*, 123 Cal. 331: "An administrator is not charged with even simple interest upon the funds of the estate which may be in his hands, unless it is made to appear to the court that the estate, or the parties interested in it, have sustained loss by

reason of his negligence or fault." There was fault somewhere and in some one for not sooner bringing to trial the suit against the administrator and thus removing the only impediment to the final settlement of the estate, but we do not think the evidence fixes such fault upon the administrator at the date of his first account or at any other precise date, so as to charge him with interest from July 28, 1891. There is evidence suggestive of the inability of the administrator to produce the money with which he charges himself. It may be that his conduct, when fully shown, will justify fixing upon him some liability beyond the funds he has received. That the matter may be fully investigated it is directed that so much of the order as charges interest be reversed and remanded for further proceedings; and as to the remaining portion of the order it be affirmed.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[Sac. No. 600. Department One.—December 11, 1899.]

MERCED BANK, Respondent, v. SOPHIE A. IVETT, Appellant.

INSOLVENT BANK—VOLUNTARY LIQUIDATION—PREFERENCE OF CREDITOR.

—The resolution of an insolvent bank to go into liquidation is a voluntary act, which does not change the relative status of itself and its creditors, or preclude it from preferring one creditor above another, in the absence of actual fraud.

ID.—CONSTRUCTION OF CODE AS TO PREFERENCE OF CREDITORS.—

Section 3432 of the Civil Code, which provides that "a debtor may pay one of the creditors in preference to another, or may give to one creditor security for the payment of his demand in preference to another," in the use of the broad term "debtor," includes corporations, as well as partnerships and individuals who are indebted, and gives to corporations equally with individuals the right to prefer one creditor above another.

APPEAL from an order of the Superior Court of Merced County denying a new trial. J. K. Law, Judge.

The facts are stated in the opinion of the court.

P. J. Hazen, for Appellant.

J. W. Knox, for Respondent.

GAROUTTE, J.—Merced Bank, a corporation, passed resolutions resolving to go into liquidation. At that time the Bank of British Columbia was its creditor, holding collateral in the form of promissory notes as security for the debt. One Ivett was also a creditor of the Merced Bank to the extent of about twenty thousand dollars. The Bank of British Columbia was threatening to realize upon its collaterals, whereupon the Merced Bank entered into a contract with Ivett by which he was to pay off the claim of this bank, take up these collaterals, and hold them as security for the money advanced, and also as security for his claim of twenty thousand dollars. This contract was carried out. At this time it may be conceded the Merced Bank was insolvent. Some eight months after this transaction the Merced Bank was thrown into liquidation under the banking act of this state by a decree of court, and thereafter it brought this action against this defendant as successor in interest of Ivett, in claim and delivery, to recover the possession of these collaterals, having first paid her the amount theretofore advanced to the Bank of British Columbia. To sustain its claim plaintiff relied upon the proposition that it was insolvent at the time the contract was entered into with Ivett, and therefore had no right to prefer him as a creditor. There are various questions discussed by counsel incidental to the main one, but we pass them by without consideration.

We attach no importance to the fact that this bank had resolved to go into liquidation. This was a purely voluntary act upon its part, and in no way changed the relative status of itself and its creditors. The board of directors that resolved the bank into liquidation at the next regular meeting had the same power to resolve it out liquidation. Indeed, it is not an unusual practice for solvent banks to resolve themselves into liquidation. This court held in the very recent case of *Lanz v. Fresno etc. Sav. Bank*, 125 Cal. 456, that a voluntary liquidation upon the part of a bank does not change its status as to creditors, and that the doors of the

courts still remain open for them to secure their rights in the usual and ordinary channels.

It has been held in this state in *Bonney v. Tilley*, 109 Cal. 346, that the directors of a banking corporation may not prefer themselves as creditors, but the question as to the preference of one ordinary, common creditor over another has never been decided. Indeed, it is apparent at a glance that the position occupied by directors of an insolvent corporation when creditors is widely variant from that occupied by the ordinary creditor.

There is a broad conflict of authority upon the question as to whether or not insolvent corporations may prefer one creditor above another. And this conflict of authority largely presents itself between the text-writers upon the one side and judicial decisions upon the other. As opposed to the doctrine of preference we find Taylor on Private Corporations, sections 668-759, Morawetz on Corporations, section 803, Wait on Insolvent Corporations, section 162 and Thompson on Corporations, section 6492 et seq. As opposed to the views of these text-writers we find the following statement made in that excellent work, the American and English Encyclopedia of Law, volume 7, page 742: "In most jurisdictions, however, this doctrine is repudiated, and it is held that in the absence of charter or statutory restrictions, and in the absence of actual fraud, every corporation, though insolvent, and though it has ceased or determined to cease doing business, may prefer certain creditors over others whenever a natural person can do so." Then follows a citation of cases supporting the text of the author, taken from twenty-six different states. This long list of authorities may be supplemented by the very recent case of *Grand De Tour Plow Co. v. Rude Brothers Mfg. Co.*, 60 Kan. 145, where the subject is ably treated. The same general doctrine is also indorsed by the supreme court of the United States in the late case of *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371. We also find that at the present time the states of Michigan, New York, and few others have express statutory provisions prohibiting corporations from preferring creditors. This legislation seems fairly to indicate that the law in those states was deemed otherwise prior to the enactment of such statutes.

It would seem that in this state we are not directly concerned as to the general principles of law governing cases of the class here presented. Beyond question the whole matter is one under legislative control, and the legislature of this state, recognizing that fact, has dealt with it accordingly. Section 3432 of the Civil Code provides: "A debtor may pay one of the creditors in preference to another, or may give to one creditor security for the payment of his demand in preference to another." The term "debtor" is a broad one, and must include corporations likewise with individuals and partnerships. We know of no principle of construction which would justify this court in holding that the word "debtor," as here used, does not include corporations. Upon the contrary, we are satisfied there is none. The conclusion is irresistible that this statute gives corporations equally with individuals the right to prefer one creditor above another. If the policy of such a law is unsound, the remedy is with the state legislature.

For the foregoing reasons the order denying a new trial is reversed and the cause remanded.

Harrison, J., Van Dyke, J., concurred.

[S. F. No. 1737. Department One.—December 12, 1899.]

JAMES DENIGAN, Appellant. v. HIBERNIA SAVINGS
AND LOAN SOCIETY et al., Respondents.

SEPARATE PROPERTY OF WIFE—DEPOSIT IN SAVINGS BANK—PASS-BOOK IN ALTERNATIVE NAMES—GIFT TO HUSBAND NOT SHOWN.—Upon the deposit of money which is the separate property of the wife in a savings bank, the taking of a pass-book showing an account with the bank in the alternative names of the husband or wife, is consistent with the desire of the wife to give her husband authority to withdraw the money for her use, when needed; and the wife having retained the right to withdraw the whole of the money, and the pass-book not being shown to have been delivered by her to the husband, nor possessed by him until after her death, no gift to the husband is shown or indicated, but the money remained the separate property of the wife, and is to be administered upon as such.

- 1D.—BURDEN OF PROOF UPON DONEE OF HUSBAND.—The burden of proof is upon a donee of the deposit claiming under the husband, without consideration, to show affirmatively that the husband had acquired a title to what had been the wife's separate property, and that it had ceased to be such.
- 1D.—PRESUMPTION—NATURE OF GIFT—RENUNCIATION OF RIGHT OF GIVER.—There is no presumption in favor of a gift. A gift in its nature divests the donor of all title, and requires a renunciation of all claim and interest of the donor in the subject of the gift. The retention by the wife of the right to withdraw the whole of the deposited money in her own name from the bank is inconsistent with the idea of a gift thereof to her husband.
- 1D.—GIFT CLAIMED AFTER DEATH—PROOF REQUIRED.—When the claim of a gift is not asserted until after the death of the alleged donor, clear and satisfactory evidence of every element which is requisite to constitute a gift is required to sustain such claim.
- 1D.—APPEAL BY CLAIMANT UNDER HUSBAND—PAYMENT BY BANK ON HUSBAND'S ORDER—QUESTION OF AUTHORITY NOT INVOLVED.—The husband not having title to the deposit, could give none to his donee thereof, and upon appeal by one claiming as such donee from a judgment sustaining the title of the wife's administrator to the residue of the deposit, after deducting a payment made by the bank, after the husband's death, to a third person on the husband's written order, cannot question the authority of the bank to make such payment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

George D. Collins, and James Gartlan, for Appellant.

Tobin & Tobin, for the Hibernia Savings and Loan Society, Respondent.

J. D. Sullivan, and John O'Gara, for A. C. Freese, Administrator of Ellen Denigan, Deceased, Respondent.

HARRISON, J.—July 6, 1886, Ellen Denigan deposited with the Hibernia Savings and Loan Society the sum of seventeen hundred dollars, and received from the bank a pass-book entitled "No. 133,269, Frank Denigan or Ellen Denigan in account with the Hibernia Savings and Loan Society." There is no evidence of the form in which the account was opened upon the books of the bank, but it is assumed

that it was opened in the same form in which it was entered upon the pass-book. February 27, 1888, an additional deposit of thirteen hundred dollars was made with the bank and entered upon the pass-book. Frank Denigan was the husband of Ellen, and at the times of the above deposits the moneys so deposited were the separate property of Ellen. She died July 3, 1896, and at the time of her death the moneys so deposited, together with fifty-six dollars and twenty-five cents interest that had accumulated thereon, remained with the bank to the credit of the above account. October 19, 1896, her surviving husband caused two thousand four hundred and thirteen dollars and thirty-three cents to be transferred upon the books of the bank from this account to a new account, and received from the bank a pass-book entitled "No. 212,145, Francis Denigan or James Denigan in account with The Hibernia Savings and Loan Society." James Denigan was the nephew of Francis, and the reason assigned for this transfer was, that on the death of Francis the nephew could distribute the amount then in bank to himself and his two sisters. November 28, 1897, Francis gave to one M. D. Connelly the pass-book last named, with an order in writing directing the bank to pay to Connelly, out of said deposit, the sum of one thousand dollars; and upon the presentation of this order with the pass-book that amount was upon the next day paid to him. Francis Denigan died November 29, 1897, and this payment was not made until after his death. Thereafter James Denigan, the plaintiff herein, presented the pass-book to the bank and demanded payment of the amount of said account without any deduction for the amount paid to Connelly, and upon the refusal of the bank commenced the present action to recover from it the sum of two thousand four hundred and sixty-three dollars. After the death of Francis Denigan the court appointed a special administrator of his estate, who thereupon notified the bank that he claimed the money held under this deposit, and at the instance of the bank was made a party defendant, and filed an answer setting forth the claim of the estate to the money. Letters of administration upon the estate of Ellen Denigan were issued to A. C. Freese, the public administrator, and he filed a complaint in intervention claim-

ing the money in behalf of his intestate. The cause was tried by the court, and findings of fact made by it to the effect that the money originally deposited by Ellen was her separate estate, and that her husband never acquired any title or interest therein; that the transfer by her husband of said deposit to the account of himself and the plaintiff herein was without any right or authority, and that said transfer was without any consideration moving from the plaintiff. The court found that the sum of fourteen hundred and sixty-three dollars and thirty-three cents of said deposit still remains in the possession of the bank, and that it was the separate property of Ellen, and an asset of her estate, and that the intervenor was entitled to recover the same. Judgment was thereupon rendered in favor of the intervenor for this amount against the bank, and that neither the plaintiff nor the estate of Francis Denigan had any right to any portion of said money. From this judgment and an order denying a new trial the plaintiff has appealed.

The plaintiff's right to the money depends entirely upon the title or right which Francis Denigan had thereto. The plaintiff gave no consideration therefor, and can sustain his right to this money only by showing that Francis had acquired a title thereto superior to that of the personal representatives of Ellen. As is was conceded at the trial that at the time the money was deposited by Ellen it was her separate property, it was incumbent upon anyone setting up a claim thereto against her personal representative to show that he had in some way acquired her title. There is nothing in the record herein showing any declarations or conversation respecting the purpose of making the deposit in the form in which it was made, or the circumstances under which the deposit was made. Both of the parties to the transaction are dead, and the only fact that is urged in support of the plaintiff's claim that Ellen parted with her title to the money is the form in which the account was opened and in which the pass-book was issued by the bank. The claim by the appellant that she thereby made a gift of the money to her husband is untenable. It is not shown that the husband had any possession of the bank-book until after the death of his wife, and the authorities which hold that under certain circumstances the delivery of a savings bank-book is a constructive

or symbolical delivery of the money represented by it, and which are cited by the appellant in support of his claim that there was a gift to the husband, are inapplicable. Possession of a bank-book may be a circumstance in determining the ownership of the money represented by it, but is not of itself determinative of that fact, in the absence of any evidence as to how the possession was obtained. Possession is not the equivalent of delivery. There may be possession where there has been no delivery, but there cannot be a valid delivery of a chattel unless it is accompanied by possession actual or constructive; and, as it was not shown that the bank-book was ever delivered by Ellen to her husband, one of the essential elements of a gift is wanting. There is no presumption in favor of a gift (*Grey v. Grey*, 47 N. Y. 552; *White v. Warren*, 120 Cal. 322); and in the present case the idea of a gift is inconsistent with the retention by the wife of the right in herself to withdraw the whole of the money from the bank. A valid gift goes into immediate effect, and has no reference to the future. It divests the donor of his title, and requires a renunciation on his part of all claim and interest in the subject of the gift.

The form in which the deposit was made is entirely consistent with a desire on the part of the wife to give to her husband authority to withdraw money from the bank from time to time as she might need it, and it should not be held that she intended to part with her title thereto by reason of an ambiguous phrase, which is quite consistent with a contrary purpose. (*Matter of Ward*, 2 Redf. 251; *Orr v. McGregor*, 43 Hun, 528; *Shuttleworth v. Winter*, 55 N. Y. 624; *Marshal v. Crutwell*, L. R. 20 Eq. 328; *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531; *Matter of Bolin*, 136 N. Y. 177; *Flanagan v. Nash*, 185 Pa. St. 41.) When the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift. (*Depuy v. Stevens*, 37 N. Y. App. Div. 293; *Whalen v. Milholland*, 89 Md. 199.)

Upon the evidence before it the superior court properly held that the title of Ellen to the moneys in the bank had not been divested at the time of her death, and that the ad-

ministrator of her estate was entitled to judgment against the bank for the recovery of these moneys.

The appellant urges, in further support of his appeal, that the bank was not authorized to make the payment of one thousand dollars to Connelly, and that the judgment in favor of the bank to that extent is erroneous. As we hold, however, that the appellant has no interest in the moneys that were deposited with the bank by Ellen, he is not in a position to question the correctness of this portion of the judgment. The administrator of the estate of Ellen has not appealed from the judgment, and, as between him and the bank, the action of the court is not open to review.

The judgment and order are affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1826. Department One.—December 12, 1899.]

JAMES DENIGAN, Respondent v. SAN FRANCISCO SAVINGS UNION et al., Defendants. A. C. FREESE, Administrator of Estate of Ellen Denigan, Deceased, Appellant.

SEPARATE PROPERTY OF WIFE—DEPOSIT IN SAVINGS BANK—PASS-BOOK IN JOINT NAMES PAYABLE TO EITHER—GIFT OR JOINT OWNERSHIP NOT SHOWN.—Upon the deposit of money which is the separate property of the wife, the taking of a pass-book showing an account in the names of the husband and his wife, "and payable to the order of either of them," does not, by the form of the deposit, indicate any gift to the husband, or any joint interest of both parties in the deposit, with right of survivorship, or change the rules applicable to a deposit of the wife's separate property in the alternative names of the husband or wife.

ID.—BURDEN OF PROOF UPON HUSBAND'S DONEE.—The burden is upon husband's donee of the deposit to show that it ceased to be the separate property of the wife, and that by the wife's intention title thereto was vested in the husband, and, in the absence of evidence tending to sustain that burden, his claim must be denied.

ID.—CREATION OF JOINT INTEREST—EXPRESS DECLARATION REQUIRED.—A joint interest in personal property, with the right of survivor-

ship, can only be created in accordance with section 683 of the Civil Code, which applies both to real and personal property, and requires it to be created by a title vested in several persons in equal shares by a single instrument, in which a joint tenancy is expressly declared. It cannot be established in respect of money belonging to the wife by an independent title, by depositing it and taking a pass-book in the names of the husband and wife without any express declaration that the money should be held in joint tenancy.

Id.—WORDS INCONSISTENT WITH JOINT INTEREST.—The use of the words in the pass-book "payable to the order of either of them" is inconsistent with a joint interest, and takes away any valid claim thereof.

Id.—PRESUMPTION OF JOINT RIGHT—CONSTRUCTION OF CODE.—The provision of section 1431 of the Civil Code, that a right created in favor of several persons is presumed to be joint and not several, unless overcome by express words to the contrary, has reference only to the relation between the parties in whose favor the right is created and the party against whom it exists, and does not determine the relation of joint interest and benefit of survivorship as between the owners of the right in their relations to each other.

Id.—SURVIVORSHIP OF RIGHT OF ACTION—TRUSTERSHIP OF FUND.—The survivorship of a right of action upon a joint chose in action does not divest the beneficial ownership of the deceased promisee, and the surviving promisee, upon collecting the fund, is a trustee of the estate of the decedent, according to his right, as between them, in a part or in the whole of the fund, as the case may be.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

J. D. Sullivan, and John O'Gara, for Appellant.

It being admitted that the money deposited was the separate property of Ellen Denigan, it will be presumed that she continued to be the sole owner until shown to be divested of her title. (Code Civ. Proc., sec. 1963, subd. 32; *Estate of Bauer*, 79 Cal. 311; *Kidder v. Stevens*, 60 Cal. 414; *Walsh v. Walsh*, 84 Cal. 101.) The making of the deposit in the names of Frank Denigan and Ellen Denigan, payable to either, indicates no gift, or intention to give an estate to the husband, but only indicates an authority to the husband to

withdraw the money of the wife, for her convenience. (*Flanagan v. Nash*, 185 Pa. St. 41; *Drew v. Hegerty*, 81 Me. 231; 10 Am. St. Rep. 255; *Matter of Bolin*, 136 N. Y. 178; *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531; *Estate of Cunningham*, 1 Myrick Prob. Rep. 76; *Schick v. Grote*, 42 N. J. Eq. 352; *Smith v. Speer*, 34 N. J. Eq. 333; *Brown v. Brown*, 23 Barb. 565; *Matter of Ward*, 51 How. Pr. 316; *Baker v. Hedrich*, 85 Md. 660.) Every presumption is against a valid gift from the wife to the husband (*White v. Warren*, 120 Cal. 322), and such a gift cannot be established, especially after her death, except upon the most indisputable evidence. (*Shuttleworth v. Winter*, 55 N. Y. 624.) There is no proof of delivery which is essential to a gift. (Civ. Code, sec. 1147.) There is no proof of joint ownership, for want of express words. (Civ. Code, sec. 683.) Joint obligations are not affected by the principle of survivorship, under section 1431 of the Civil Code. (*Lawrence v. Doolan*, 68 Cal. 309; *Bostwick v. McEvoy*, 62 Cal. 496.) The share of a deceased joint obligee must belong to his estate where no express joint tenancy was vested with right of survivorship under section 683 of the Civil Code.

George D. Collins, and James Gartlan, for Respondents, James Denigan and Margaret E. Maher, Administratrix of Francis Denigan, Deceased.

The act of Ellen Denigan in making the deposit in the names of herself and husband operated in law in the nature of a gift to him. (*McElroy v. National Sav. Bank*, 40 N. Y. Supp. 340; *Gardner v. Merritt*, 32 Md. 78; 3 Am. Rep. 115; *George v. Bank of England*, 7 Price, 651; *Metropolitan Sav. Bank v. Murphy*, 82 Md. 320, 321; 51 Am. St. Rep. 473.) The consequence of the deposit was to create a chose in action in favor of Ellen Denigan and Francis Denigan jointly. (Civ. Code, secs. 1818, 1878; *National Bank of Republic v. Millard*, 10 Wall. 152.) The transaction shows that a joint account in their favor was intended. (*Metropolitan Sav. Bank v. Murphy*, *supra*.) Section 683 of the Civil Code only applies to the joint tenancy in things corporeal, while choses in action are regulated by section 1431 of the Civil Code. There being no express words to the contrary, a joint ownership of the chose in action was created with the right of sur-

vivorship. (*Mack v. Mechanics' Bank*, 50 Hun, 477; 3 Am. & Eng. Ency. of Law, 2d ed., 831.) Delivery of the chose in action to one of the joint owners or obligees was a delivery to both of them. (*Eshelman v. Henrietta Vineyard Co.*, 102 Cal. 199.) Payment to either would extinguish the chose in action. (*Delano v. Jacoby*, 96 Cal. 278; 31 Am. St. Rep. 201.) The transaction in question is sustained by the following cases: *Dimond v. Sanderson*, 103 Cal. 97; *Tillaux v. Tillaux*, 115 Cal. 663; *Smith v. Mason*, 122 Cal. 427. The husband being the owner of the fund, it was competent for him to make a gift, and create a trust therein. (*Booth v. Oakland Bank*, 122 Cal. 19.)

HARRISON, J.—The questions presented upon this appeal are similar to those involved in the case of *Denigan v. Hibernia Sav. etc. Soc.*, ante, p. 137. Ellen Denigan died July 3, 1896, and at the time of her death there was on deposit in the San Francisco Savings Union certain money standing upon the books of the bank in the names of herself and her husband, Frank Denigan, payable to the order of either of them. It was admitted at the trial that this account originated in a single deposit of three thousand dollars, made by her in this form February 27, 1888, and that at the time of the deposit it was her separate property. October 19, 1896, Frank Denigan caused the sum of fourteen hundred dollars to be transferred upon the books of the bank from this account to a new account entitled "Frank Denigan or James Denigan," with directions to the bank from both Frank and James to pay to the individual order of either. Frank Denigan died in December, 1897, and after his death the plaintiff brought the present action to recover from the bank the amount of the deposit. Under an order of the court, the administrator of the estate of Frank Denigan was substituted as defendant in place of the bank, and the bank was permitted to pay into court the amount of the deposit, and was thereupon discharged from liability therefor. The administrator of the estate of Ellen Denigan filed a complaint in intervention claiming the deposit as a part of her estate. The cause was tried by the court, and findings made to the effect that the money was the separate property of Ellen, and that her husband never had any interest therein other than as

agent to withdraw the same for her and for her benefit; that the withdrawal by him of the fourteen hundred dollars, and the opening of the new account with the bank therefor, was without right; that the plaintiff herein paid no consideration for said transfer and had no right to said money. Judgment was accordingly rendered in favor of the intervenor for the amount that had been paid into court. Subsequently the court set aside its decision and granted a new trial. From this order the intervenor has appealed. The record does not show upon what grounds a new trial was asked, or upon which the court set aside its decision, and no error of law is assigned in the bill of exceptions, but it is stated therein that the evidence is insufficient in certain particulars to justify the decision. The particular in which it is suggested upon the appeal that the decision is not sustained by the evidence is that in its decision the court found that at the death of Ellen, and for a long time prior thereto, the deposit stood on the books of the bank "payable to either Ellen Denigan or Frank Denigan," whereas it appears from the evidence that the deposit stood upon the books "in the names of Frank Denigan and Ellen Denigan, his wife, and payable to the order of either of them." Although the finding upon this point is not as extensive as the evidence, it cannot be said that so far as it is made it is not sustained by the evidence. It is, however, stated in the brief for the appellant that the decision was set aside by reason of the fact that the deposit made by Ellen in the names of herself and husband, payable to either, indicated an intention to give to him one-half of the deposit. The respondent, moreover, contends that by this form of the deposit a joint interest therein was created in favor of both, and that by virtue of the husband's survivorship he became vested with a right to the entire deposit.

What has been said in the opinion in *Denigan v. Hibernia Sav. etc. Soc.*, *supra*, in reference to the proposition that by the deposit Ellen made a gift to her husband is applicable here. As therein shown, there is nothing, aside from the form in which the deposit account was opened, to show any intention on her part to part with her interest in the money, or to establish any of the elements of a completed gift. The only difference between the forms of the deposits in the two

cases is that in the present case the account was opened in the name of "Francis and Ellen Denigan, payable to either," whereas in the other case the account and pass-book were entitled "Frank Denigan or Ellen Denigan in account with the Hibernia Savings and Loan Society." This difference in the form of the deposit or of the account does not, however, change the rule governing the rights of the parties to the money deposited. At the time of the deposit in each case the money was the separate property of Ellen, and, in the absence of any evidence tending to show a purpose or intention on her part to part with the title, it remained her separate property at the time of her death, notwithstanding its deposit in this form. The burden was upon the plaintiff to show that it had ceased to be her separate property, and, in the absence of any evidence tending thereto, his claim must be denied. In *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486, the deposit stood upon the books of the bank, "Joseph Henry, Margaret Taylor, and the survivor of them, subject to the order of either." The money was the property of Joseph Henry at the time it was deposited, and upon his death his sister Margaret claimed it by virtue of this form of the account. The court held that she was not entitled to it, saying: "The whole question depends upon the meaning and intention of the deceased in making the deposit in the form adopted, as gathered from the entry in the bank-book and all the circumstances surrounding the deceased at the time"; and after holding that the words "and the survivor of them" did not import a gift, said: "Here the deposit was in the joint names of the deceased and his sister, and the survivor of them, but subject to the order of either. Having thus retained the power to draw out the money, the deceased did not divest himself of dominion and control over the fund. He could have drawn out every dollar after the deposit, or at any time up to the moment of his death, and applied it in any manner he might have thought proper. It is not contended that the sister had the least right or interest in the money before the deposit; nor is it contended that she acquired any interest therein otherwise than by the supposed gift of the brother; and the only evidence relied upon to support the *factum* of the supposed gift is the form of the entry in the bank-book. But, as will be observed, there are no terms in the entry that

import of themselves an actual present donation by the brother to the sister; and the dominion retained by the brother over the fund enabled him to displace and utterly destroy all power conferred upon the sister in respect to the fund." The same principle was afterward maintained in *Gorman v. Gorman*, 87 Md. 338. In *Schick v. Grote*, 42 N. J. Eq. 352, a deposit had been made in the following form: "Bank for Savings in account with August Grote and wife, Edvina, or either." The money was the property of Mr. Grote, and after his death it was claimed in a suit for the same by his wife that by depositing it in this form he had made her a gift of it. The court held otherwise, saying: "The form of the account in which the deposit was made is not evidence of gift to the wife." In *Noyes v. Newburyport Sav. Inst.*, 164 Mass. 583, 49 Am. St. Rep. 484, it was held that a deposit by Annie M. Pike, under an account headed "Annie M. Pike and Mary L. Hewett, payable to either or the survivor," remained the property of the original depositor, and that after her death her executors were entitled to the same. The cases cited by the respondent do not contravene the rule held in the above cases. In *Mack v. Mechanics' etc. Bank*, 50 Hun, 477, cited by him, there was testimony before the court tending to show that after the deposit had been made the depositor came to the bank with his mother, and had the account changed to their joint names, and afterward made a gift of the deposit to her. In *Metropolitan Sav. Bank v. Murphy*, 82 Md. 315, 51 Am. St. Rep. 473, the only question presented for determination was the liability of the bank upon its contract. At the time the deposit was made there was written at the head of the account in the bank-book, at the request of the depositor, an agreement that at the death of either the balance should belong to the survivor. After his death the bank paid the balance to the other. In an action by his executors against the bank to recover the deposit, judgment was given in favor of the bank upon the ground that in making the payment to the survivor the bank had merely carried out its contract, and could not be required to pay the same again.

The respondent's claim that Francis became vested with Ellen's title to the deposit by virtue of his survivorship is

equally untenable. Title by survivorship exists only when the estate is held in joint ownership, and, unless the deposit was owned by Francis in the lifetime of Ellen jointly with her, there was no joint interest therein to which the incident of survivorship could attach. We have seen that she did not part with her title to the deposit by reason of the form in which it was made, and, as the title of Francis depends entirely thereon, it is evident that he had no joint interest with her in the moneys so deposited. Joint interests or estates are such as are acquired at the same time and by the same title. Section 683 of the Civil Code declares: "A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." The proposition of the respondent that this section applies only to real estate is without support. There is no limitation of this character in the section, and, as it is found in the title headed "Ownership" and the chapter thereof which treats of "Interests in Property," irrespective of its character, it must be held applicable to all kinds of property. The money deposited by Ellen was up to that time her separate property, and it cannot be said that she then acquired any interest therein; and, if it could be assumed that by reason of the form in which the deposit was made Francis acquired any interest therein, it was acquired at a different time and by a different title from that of Ellen. There was no declaration that the money should be held in joint tenancy, and the words "payable to either" placed in the account take away the claim of a joint interest. In *Gorman v. Gorman*, *supra*, the entry of the deposit made in the book was "Theresa McConnell and her niece, Maggie S. Gorman, joint owners; payable to the order of either or the survivor." The money was the individual property of Theresa, and the account was changed upon the books of the bank into this form at her request, and the entry was signed by her and Miss Gorman. The court held that, although the words "joint owners" were employed, the deposit did not become the joint property of both. In *Taylor v. Henry*, *supra*, the court refused to sustain the claim of the sister by virtue of her survivorship upon the ground that the

gift was not perfect and irrevocable during the life of the donor. The same rule was observed in *Whalen v. Milholland*, 89 Md. 199.

The respondent further urges that upon the deposit in the bank the money became the property of the bank, and that by virtue of the transaction then effected a chose in action resulted wherein a joint liability was created on the part of the bank in favor of Ellen and her husband, which, upon the death of Ellen, survived to the husband, and in support of this proposition cites section 1431 of the Civil Code, which provides that a right created in favor of several persons is presumed to be joint and not several, and that this presumption can be overcome only by express words to the contrary. This provision has reference, however, merely to the relation between the parties in whose favor the right is created, and the party against whom it is created. It is correlative to the obligation incurred by the party against whom the right exists, but does not purport to determine the interest of the parties in whose favor the right exists as between themselves. As Ellen did not divest herself of her property in the money by the form in which she made the deposit, she retained the same interest in this property represented by the chose in action or right resulting from the obligation thereby assumed by the bank. Her husband acquired no right to the money which he might obtain upon this chose in action as against her. While the bank would have been authorized to pay all or any portion of it to him in her lifetime, he could have been compelled to account to her for what he might thus receive; and in an action against the bank wherein the claim of each is presented for adjudication the court is authorized to render a judgment according to their respective rights. The right of action on a bond held by two joint obligees, or on a promise for the payment of money to two joint promises, vests in the death of one in the survivor (1 Parsons on Contracts, 31); but the right of the deceased obligee or promisee is not extinguished by his death. The survivor will hold the security and the proceeds as trustee to the extent of the interest of the deceased joint obligee or promisee in the debt or fund, and, if the survivor had no interest in the fund, he will hold the whole

thereof for the benefit of the estate of the deceased. (*Mulcahey v. Emigrant etc. Sav. Bank*, 89 N. Y. 435.) Mr. Freeman, in his treatise on Cotenancy and Partition, says in section 16: "The loan of money, for which a mortgage is given, is not regarded as a transaction which would ordinarily raise the presumption that the parties thereby intended to create a joint ownership in the thing lent with the benefit of survivorship." In *Blake v. Sanborn*, 8 Gray, 154, an action to foreclose a mortgage given to four persons to secure a note payable to them was held to be properly maintained by the survivors, but the court said: "If the conditional judgment is discharged by payment, they will, of course, be answerable over to the administrator of the deceased mortgagee for one-fourth of the note; if the mortgage is foreclosed, they will hold the land in trust for all concerned in the mortgage." (See, also, *Burnett v. Pratt*, 22 Pick. 556; Story's Equity Jurisprudence, sec. 1206; Bliss on Code Pleading, 3d ed., sec. 62.) Counsel for respondent cites in support of his claim *Sanford v. Sanford*, 45 N. Y. 723, where the husband loaned certain money and received therefor a promissory note payable to himself and his wife, and in which it is said in the opinion: "Taking this note in the name of himself and wife shows that the husband intended thereby to give it to her in case she survived him, and a delivery to her was unnecessary to perfect the gift." But we are compelled to coincide with Judge Redfield, who, in commenting upon this in *Matter of Ward*, 2 Redf. 251, said that this language "seems to run directly counter to all settled notions of the law in respect to such gifts, and seems not to have been fortified by the learned judge who delivered that opinion by any authority." The language above quoted is to be regarded rather as *dictum* than as authority, since, after stating that the note belonged to the wife as the survivor, it held for other reasons that the maker owed it to the estate of the husband, and not to the wife, and reversed a judgment in her favor, upon the ground that she was not the real party in interest.

We hold, therefore, that Francis Denigan had no interest in the deposit during the lifetime of his wife, and did not upon her death become vested with any interest therein as against the claim of her administrator, and that, as the evidence incorporated in the bill of exceptions would not

have authorized a judgment in favor of the plaintiff, the court erred in setting aside its decision.

The order granting a new trial is reversed.

Garoutte, J., and Van Dyke, J., concurred.

[Sac. No. 766. In Bank.—December 12, 1899.]

LILLIAN MAY BROUSE, Executrix, etc., Petitioner, v. J.
K. LAW, Judge of the Superior Court of Merced
County, Respondent.

**ESTATES OF DECEASED PERSONS—NOTICE TO CREDITORS—POWER OF
JUDGE TO DESIGNATE NEWSPAPER—FUNCTION OF ADMINISTRATOR.—**

In an order for the publication of notice to the creditors of a deceased person, the superior court has no power to designate any newspaper published in the county, but his power of designation of a newspaper is limited to the case where no newspaper is published in the county. The publication of the notice in some newspaper published in the county, or of any additional notice ordered published therein, is a function to be performed by the executor or administrator.

ID.—POWER TO ADJUDGE QUESTION OF DUE PUBLICATION.—The power of the court to examine the character of the notice that has been published, and to adjudge whether or not due publication has been made, and to refuse to adjudge due publication if it was not sufficient, does not involve the power to designate in the original order the newspaper in which the notice is to be published.

WRIT of review from the Supreme Court to annul an order of the Superior Court of Merced County, in so far as designating a newspaper for the publication of notice to the creditors of a deceased person. J. K. Law, Judge.

The facts are stated in the opinion of the court.

James F. Peck, for Petitioner.

T. C. Law, for Respondent.

HARRISON, J.—After the superior court of Merced county had admitted to probate the last will and testament of Augustine Smith, deceased, and had issued letters testa-

mentary thereon to the petitioner, it made the following order:

"It is ordered that notice to the creditors of Augustine Smith, deceased, requiring all persons having claims against said deceased to exhibit them with the necessary vouchers to Lillian M. Brouse, executrix of the last will and testament of Augustine Smith, deceased, at her residence or place of business, to be specified in said notice, be given by said executrix by publication in 'The Merced Express,' a newspaper printed and published in Merced county, state of California, once a week for four successive weeks.

"Done in open court this 9th day of November, 1899:

• "J. K. LAW,

"Judge of the Superior Court of Merced County, State of California."

The executrix has petitioned this court for a writ of review of said order upon the ground that the superior court had no jurisdiction to designate the newspaper in which she should publish the notice to the creditors of the deceased, and upon her petition the writ was issued and return made showing that the above order was made.

Section 1490 of the Code of Civil Procedure declares as follows: "Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one—if not, then in such newspaper as may be designated by the court—a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting."

The publication of this notice is a function which the statute declares shall be performed by the executor and administrator, and, like any other duty imposed upon that officer, unless some restriction is placed upon him, the manner and mode of its performance is in the first instance to be determined by him. The provision that if there is no news-

the compensation of its own reporter thereunder, is not fixing the salary of a county officer, but is adjusting compensation for services of a ministerial officer of the court, and in so doing acts not in a legislative, but in a judicial capacity.

Id.—UNCONSTITUTIONAL AMENDMENT OF 1885—REPEAL.—The amendment of 1885 to section 274 of the Code of Civil Procedure authorizing the court to order payment of a monthly salary of an official reporter out of the treasury is unconstitutional and invalid for any purpose, and cannot operate as a repeal of the amendment of 1880.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Carroll Cook, Judge.

The facts are stated in the opinion.

I. J. Truman, Jr., and J. H. Dickinson, for Appellant.

George D. Collins, for Respondent.

CHIPMAN, C.—Appeal from a judgment for a peremptory writ of mandate ordering appellant to pay plaintiff one hundred and seventeen dollars for services as the regular phonographic reporter in Department 12 of the superior court in and for the city and county of San Francisco.

Plaintiff was duly appointed the phonographic reporter of the above-named court; he performed services as such, under order of the court, in certain felony cases and transcribed the testimony, the value of which services was found to be the above amount. Thereafter, to wit, on April 8, 1899, he served upon defendant an order of the court duly given and made, accompanied by a certificate of said services and their value, directing defendant to pay the said amount, which defendant refused to do. The matter was heard before Judge Carroll Cook, who gave judgment for plaintiff and ordered the writ to issue, commanding defendant to pay plaintiff the amount claimed, "out of the treasury of the said city and county of San Francisco."

Appellant attacks the judgment upon the following grounds: 1. By demurrer, for insufficiency of the complaint; 2. Section 274 of the Code of Civil Procedure, as passed in 1880, is unconstitutional; 3. The order appointing plaintiff as the regular official reporter of the court is void, as the power to appoint was taken away from the court by the

act of March 21, 1885 (Stats. 1885, p. 218), amending said section 274; 4. The order of April 8, 1899, was not audited by the auditor of the city and county; 5. The order did not designate the fund out of which payment should be made; 6. There was no money in the treasury because the fund out of which payment could be made was exhausted.

1. The point upon demurrer is that the petition does not state that there was money to pay the order, or that the treasurer had the ability to comply with the writ. (Citing *Redding v. Bell*, 4 Cal. 333.)

There was no duty put upon appellant, as treasurer, to pay the order unless he had funds in his control applicable to that purpose, and whether he had the ability to comply with the order ought to have been shown. The rules of pleading in seeking the extraordinary aid of *mandamus* require the petitioner to show a clear *prima facie* case to warrant the alternative writ. There should be sufficient facts stated in the petition to show that the defendant is under legal obligation or duty to perform the required act. (High's Extraordinary Legal Remedies, secs. 449, 450; Wood on Mandamus, 18; *Redding v. Bell*, *supra*.) The complaint failed to allege that there was any fund out of which plaintiff could be paid, and was, therefore, insufficient. The defendant, however, alleged in his answer that there were no funds in the treasury out of which he could pay plaintiff; but at the trial defendant admitted that there were funds in the treasury to the credit of the general fund greatly in excess of plaintiff's claim, and no objection was then made to evidence being introduced upon that point, and no objection is now made to the findings of the amount of money in the treasury to the credit of that fund. The cause was tried by both parties upon the theory that the condition of the various funds was an issue in the case, and no objections to the findings are now urged as to the facts found touching the amounts to the credit of those funds. Under such circumstances, we do not think that the judgment should be reversed for the failure to allege that there was money in the treasury out of which plaintiff could have been paid.

2. It was not necessary to the payment of the claim that

it should have been presented to the auditor. (*Ex parte Reis*, 64 Cal. 233. See, also, *Boys etc. Aid Soc. v. Reis*, 71 Cal. 627; *McAllister v. Hamlin*, 83 Cal. 363.)

3. Nor was it necessary to the validity of the order of the court that it should have designated the fund out of which to make payment. The code directs the payment to be made "out of the treasury of the county in which the case is tried, upon the order of the court." The duty is devolved upon the court, after having fixed the compensation to be paid, to make the order upon the treasury of the county. It is made the duty of the treasurer to "receive and safely keep . . . all moneys belonging to . . . the treasury." (Consolidation Act, sec. 79.) The term "treasury" includes all the moneys of the municipality under the control of the treasurer, whether belonging to a designated fund or not. The act declares that "the general fund consists of all moneys in the treasury not designated and set apart to a specified use, and of the overplus of any special fund remaining after the satisfaction of all demands upon it." (Consolidation Act, sec. 76.) If there were no other specially designated funds, the general fund would constitute the treasury. Section 71 provides that "the general fund shall be applied and used for the payment of all sums authorized by law to be paid out of the general fund and not otherwise provided for in this act." The order of the court upon the treasury, therefore, was an order for payment out of the general fund. The fact that a fund had been designated for the payment of phonographic reporters could not in any way affect the provisions of section 274 of the Code of Civil Procedure (amendment of 1880), by which it became the duty of the court to make the order upon the treasury. The board of supervisors could not defeat the law by creating a special fund which might be inadequate to meet the payment of such claims as this, or, indeed, might be so limited as to seriously affect the administration of justice by the courts. (*San Francisco v. Broderick*, 111 Cal. 302.) The evidence is, and the court found, that when the order was presented the special fund to which moneys had been transferred for payment of such claims, was exhausted, but there remained unappropriated, in the general fund, two hundred and five thousand seven hundred and fifty-seven dollars and forty-two cents. We think this

fund was applicable to the payment of the order of the court. (*Ex parte Reis, supra*, and other cases cited *supra*.)

4. The principal point relied upon is the unconstitutionality of section 274 of the Code of Civil Procedure, as it was enacted by the act of April 1, 1880 (Stats. 1880, p. 63, at p. 99), which reads: "In criminal cases, when the testimony has been taken down or transcribed upon the order of the court, the fees of the reporter shall be certified by the court, and paid out of the treasury of the county, or city and county, in which the case is tried, upon the order of the court." This section was amended by act of March 21, 1885 (Stats. 1885, p. 218), in which it was undertaken to make the reporter a salaried officer of the court and to give the judge of the court the power to fix the monthly salary.

The amendment of 1885 was in some particulars held to be unconstitutional, and appellant contends in all other particulars it must stand and therefore works the repeal of the section as it stood in 1880. Just what effect this contention, if sound, would have upon the case here need not be considered, for we are clearly of the opinion that the amendment of 1885 has no longer a foot to stand upon. (*Smith v. Strother*, 68 Cal. 194; *James v. McCann*, 93 Cal. 513; *Taylor v McConigle*, 120 Cal. 123. See, also, *Los Angeles v. Pomeroy*, 124 Cal. 597.) We do not think the section as amended is susceptible of division so as to preserve the portion not distinctly held to be unconstitutional, and the court has so intimated in the cases *supra*. We must deal alone with the section as amended in 1880. (*Los Angeles v. Pomeroy, supra*.) It is attacked as violative of section 1, article III, of the constitution, as conferring legislative power upon the judicial department of government. The court has frequently had this section of the code before it, and has found in it authority both to appoint a reporter and fix his compensation for services rendered and order payment either by one or both of the parties, if in a civil action, or by giving an order on the treasury of the county if in a criminal case. As to the latter class of cases see *Ex parte Reis, supra*; *People v. Lon Me*, 49 Cal. 353; *McAllister v. Hamlin, supra*. As to civil cases see *Rhodes v. Spencer*, 68 Cal. 199; *Barkly v.*

Copeland, 86 Cal. 493; *James v. McCann*, *supra*; *Taylor v. McConigle*, *supra*; *Los Angeles v. Pomeroy*, *supra*.

It is not reasonable to suppose that the court of last resort in all these cases unwittingly lent its aid to the enforcement of statutes which violated the constitution. It is more reasonable to assume that the court treated the statutes as constitutional. However this may be, we think the question here presented has been directly passed upon, as will be noticed later.

Substantially the same legislation was put in force as early as 1861 (Stats. 1861, p. 497), and has been in force ever since. The section of the constitution of 1849 is identical with the section of the constitution of 1879 relied upon. While perhaps not conclusive, the fact that the courts have exercised the power under the old and new constitutions for nearly forty years gives a practical construction of these instruments which ought to have great weight in determining the question, if any doubt exists. (Cooley's Constitutional Limitations, 81 et seq.)

Some of the various statutes which have been passed on this subject will be found in the opinions of Justices McKinstry and Thornton in *Ex parte Reis*, *supra*, and need not be recapitulated here.

The official or phonographic reporters of superior courts are authorized to be appointed by the judge or judges of such courts under part I of the Code of Civil Procedure, sections 268-74, as the law was enacted April 1, 1880 (Stats. 1880, p. 63; see pp. 97-99). The compensation to be paid reporters, except where otherwise provided by the County Government Act of April 1, 1897 (Stats. 1897, p. 452), is regulated under the amendment of 1880.

As to the city and county of San Francisco, and the counties of certain sixteen other classes, the County Government Act makes no provision whatever for appointing or fixing the compensation of court reporters. In all these the act of 1880 apparently is the only law in force. In some of the other classes the County Government Act gives the judges the power to appoint, but the act fixes the compensation by a monthly salary in some cases and by per diem in others; but in four of these counties the provision is that the reporter "shall receive as compensation such fees as are now allowed

by law." In classes 48 and 49 the County Government Act makes a provision still different from all the others, by which in certain cases the boards of supervisors may fix the compensation.

The utter lack of uniformity in the law in providing for the appointment of reporters and fixing their compensation shows that the legislature has regarded these persons as a part of the machinery of the courts rather than as officers of government in any sense. As expressed by Mr. Justice Thornton, in *Ex parte Reis*, *supra*: "In view of the law-making power, these reporters were regarded as official adjuncts of the courts of justice," or as "ministerial officers of the courts."

The reporter is not among the enumerated county officers (Pol. Code, sec. 4103); and, while the legislature could create the office of official reporter and make it a county office, it has not done so in the city and county of San Francisco. The legislature has simply authorized the judge of the court to employ a person to take down and transcribe shorthand notes of court proceedings, who shall be known as phonographic reporter of the court. In civil cases his duties cannot be said to be public in any sense; in criminal cases they may be so regarded in a limited sense, inasmuch as the services are paid for out of public funds; but rendering services for the public does not of itself make him a public officer. We do not think that the fixing of the salary of a person who performs some service for the public, nor the fact that such person is required to take an oath that he will faithfully discharge his duties, would necessarily make such person a public officer or his employment an office.

The provisions of section 869 of the Penal Code confer powers upon the magistrate similar to those found in section 274 of the Code of Civil Procedure. In *McAllister v. Hamlin*, *supra*, section 869 was held to be constitutional and was also held that the magistrate, in fixing the compensation of the reporter acts in a judicial and not in a legislative capacity.

The amendment of section 274 of the Code of Civil Procedure by the act of 1885, was held unconstitutional in the case of *Smith v. Strother*, *supra*, for the reason that the act undertook to confer powers upon the judge which were legislative in their nature and could not be delegated—

namely, to fix the monthly salary of the reporter for future services to be rendered. The court said: "The act of 1885, amending section 274 of the Code of Civil Procedure, is different from the section as it stood before amended. Under the section as it stood before it was amended, the amount to be paid the reporter was fixed on valuation of the services rendered by the court or judge after they have been rendered. The court or judge under that section acted on a case which had transpired before any action was taken. The difference between the two is plain and palpable." The court disclaimed any intention to decide that the mode provided under the act of 1880 is constitutional. We think, however, that upon the authority of *McAllister v. Hamlin, supra*, we must hold the act to be constitutional.

It is advised that the judgment be affirmed.

Cooper, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1765. Department Two.—December 13, 1939.]

JOHN S. CONNICK, Respondent, v. CHARLES W. HILL
and MARY M. HILL, Appellants.

VACATING SALE UNDER FORECLOSURE—SEPARATE OFFER OF PARCEL—SALE EN MASSE.—A sale under the foreclosure of a mortgage by a commissioner appointed by the court, without direction as to the manner of sale, cannot be vacated on the ground of the sale of separate parcels *en masse*, where it appears that the commissioner had complied with the request of the mortgagor to offer them each for sale separately, and had received no separate bids, and thereupon sold the same *en masse* for a sum sufficient to satisfy the judgment.

ID.—INSUFFICIENT SHOWING.—An affidavit to set aside a commissioner's sale under foreclosure for selling certain parcels *en masse* which had been separately offered for sale without a bid, and for refusing to reoffer in parcels, or to postpone the sale, which does not show that the parcels in question were "known lots or parcels," is insufficient.

ID.—REFUSAL TO SELL IN "COMBINATIONS OF PARCELS"—STATEMENT OF GROUND—CONFLICTING EVIDENCE.—When no such ground for setting aside the sale as a refusal of the commissioner to sell in "combinations of parcels" was stated in the notice of motion, or in the

opening affidavit, and the court found upon conflicting evidence that no request for such sale was made, it must be presumed that the finding is correct, and such ground, even if otherwise tenable, must fail.

ID.—INADEQUACY OF PRICE—FINDING AS TO VALUE.—Inadequacy of price is not a sufficient ground for setting aside a judicial sale under our practice, the judgment debtor being allowed to redeem from the sale. The sale certainly cannot be disturbed where the court found, under conflicting evidence, that the full value of the property sold was less than the total purchase price.

ID.—REFUSAL TO POSTPONE SALE—DISCRETION.—It is not an abuse of discretion for the commissioner to refuse to postpone the sale, where no reason appears why the sale should have been postponed.

APPEAL from an order of the Superior Court of Humboldt County refusing to set aside a sale under a decree of foreclosure of a mortgage. G. W. Hunter, Judge.

The facts are stated in the opinion.

J. W. Turner, for Appellants.

Gregor & Connick, for Respondent.

COOPER, C.—This is an appeal from an order made by the superior court of Humboldt county refusing to set aside a sale made under foreclosure.

The plaintiff had regularly obtained a judgment and decree of foreclosure against defendants and others, and the court in the decree appointed one Belcher a commissioner for the purpose of making the sale. No directions were given in the decree as to the manner in which the property should be sold. The tract of land as a whole consisted of one body of thirteen hundred and forty acres. The commissioner, after receiving the order of sale, gave due and proper notice that on the seventh day of June, 1898, the said lands and premises would be sold in pursuance of the decree and order at public auction to the highest bidder, at the courthouse door, in the city of Eureka, at 10 o'clock A. M. of said day. At the time and place of sale the defendant Charles W. Hill, who was one of the judgment debtors, requested and directed the commissioner to offer the said lands for sale in sixty-three separate parcels. The commissioner complied with the request and offered the lands in the different parcels. He re-

ceived no bid for either of the first forty-one parcels, but the parcels from forty-two to sixty-three, inclusive, were sold to different bidders, and no complaint is made as to sale of any of these parcels other than the first forty-one. After the parcels from forty-two to sixty-three had been sold, the commissioner again offered the first forty-one lots or parcels for sale as a whole. The judgment debtor requested the commissioner to again offer the forty-one parcels separately, which request was refused. He then asked the commissioner to postpone the sale, which the commissioner refused to do. The first forty-one parcels were then offered as a whole in one lot and sold to plaintiff for the sum of ten thousand four hundred and thirty dollars, which was about the balance due him after first applying the proceeds of the sales of the lots other than the forty-one. The appellants gave due notice that they would move the superior court to set aside the sale to plaintiff upon several different grounds.

It is claimed that the sale of the forty-one lots or parcels as a whole and in one parcel was an irregularity for which the sale should be set aside. We do not think so. The commissioner had complied with the request of appellant, and, without regard to the question as to whether or not the forty-one parcels were "separate known parcels," had offered them for sale separately and received no bids. After the other parcels had been sold the appellants claim that they had the right to have him repeat what he had just done and again offer the parcels separately. If they had the right to have him again offer the parcels the second time at the same sale and before the same bidders, why not a third or a fourth? He had obeyed the dictates of the appellants to the letter, and after receiving no bids then did what he had a right to do under the circumstances—offered the property in a lump and received a bid sufficient to satisfy the judgment. He was not required to go through the idle ceremony of again offering the parcels separately. It is now the settled rule in this state that whenever separate known parcels of land are offered for sale separately in foreclosure proceedings, and no offer or bid made for either parcel, then the property may be offered and sold in one parcel. (*Marston v. White*, 91 Cal. 40; *Hibernia etc. Soc. v. Behnke*, 121 Cal. 341.) The same rule

is laid down by the supreme court of the United States (*White v. Crow*, 110 U. S. 190.) The rule is to consider every sale made by an officer of court under the mandate thereof as final. (*Hopkins v. Wiard*, 72 Cal. 262.) When a party comes into court and asks to set aside a sale the burden is upon him to show such an irregularity or material departure from the statute as will justify the court in setting it aside. It is provided in the (Code Civ. Proc., sec. 694): "The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels."

It nowhere appears in the affidavits or record that the forty-one lots were "known lots or parcels." It does appear that the appellant requested the sale of forty-one different descriptions, but it does not follow that these forty-one different descriptions were forty-one different known lots or parcels. They may have all constituted one known lot or parcel. In a motion to set aside a sale on this ground it must be made clearly to appear that the land consisted of several "known lots or parcels."

It is said the commissioner should have offered the lots in "combinations of parcels." If the law were such that appellants could require the property to be sold in combinations of parcels, the number of which might be infinite, there was a square conflict of evidence as to whether or not any request was made of the commissioner to offer the lots in such manner. We must presume in favor of the order of the court below, made upon conflicting testimony, that no such request was made. Particularly is this so when no such ground is stated in the notice of motion given by appellants, nor in their opening affidavit. And the appellants' attorney in his affidavit states that after the sale of the lots from forty-two to sixty-three, "that affiant then directed said commissioner, orally, to again offer said forty-one parcels separately once more."

Inadequacy of price is stated as one of the reasons why the sale should be set aside. This is not sufficient ground upon which to annul a sale, particularly under our practice, when a judgment debtor is allowed to redeem. (*Smith v. Randall*,

6 Cal. 53; 65 Am. Dec. 475; *Central Pac. R. R. Co. v. Creed*, 70 Cal. 501.) But the evidence as to the value was conflicting, and we must presume, in favor of the order of the lower court, that ten thousand dollars is and was the full value of the property as stated by plaintiff in his affidavit. This being true, the property sold for four hundred and thirty dollars more than its value.

It is said that the commissioner should have postponed the sale, and that his refusal to do so is ground for setting it aside. It appears that the commissioner was requested to postpone the sale of the forty-one parcels to 2 o'clock of the same day, and, after consultation with his attorney, refused to do so. No reason is given why the sale should have been postponed. While there may be circumstances that would justify an officer in postponing a sale, it clearly is not an abuse of discretion in all cases to refuse such postponement.

We advise that the order be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1942. Department Two.—December 13, 1899.]

C. S. NELLIS, Appellant, v. PACIFIC BANK et al., Defendants. JAMES McDONALD, Respondent.

BANK—LIABILITY OF STOCKHOLDERS TO DEPOSITORS—STATUTE OF LIMITATIONS—AMENDMENT OF COMPLAINT.—The liability of the stockholders of a bank to its depositors is barred by the statute of limitations within three years from the date of the deposit, if action is not sooner commenced thereon. If a new cause of action as to a deposit is not stated in the complaint, the statute of limitations cannot be evaded under the guise of an amendment to the complaint; but if an amendment more fully sets forth a cause of action upon a deposit defectively alleged in the original complaint, the amendment merely supersedes the original and takes its place, as of the same date, without affecting the identity of the original cause of action, as respects the statute of limitations.

ID.—ACTION BY ASSIGNEES—AMENDMENT TO CORRECT MISTAKE IN NAMES OF DEPOSITORS—IDENTITY OF CAUSES OF ACTION.—Where the original complaint against the stockholders of the bank was filed by the assignees of many depositors, the causes of action upon which were in fact owned by them before the commencement of the action, and correctly stated the amount of each deposit sued upon, but, by mistake, alleged that certain of the deposits were made by their immediate assignors, which were in fact made by others under whom their assignors lawfully claimed as assignees, an amendment correcting the mistake is allowable, and does not affect the identity of the causes of action originally sued upon, as respects the statute of limitations.

ID.—CLAIM NOT ASSIGNED.—There can be no recovery by the plaintiff of a claim alleged to have been assigned to the plaintiff, but which was not in fact assigned, and of which the plaintiff is not the owner and holder.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Seawell, Judge.

The facts are stated in the opinion.

William H. Chapman, for Appellant.

John M. Burnett, and Sawyer & Burnett, for Respondent J. M. McDonald.

CHIPMAN, C.—Plaintiff sues for himself, and as assignee of certain twenty other depositors in defendant bank, to recover from its stockholders upon their statutory liability as such stockholders. Plaintiff had judgment against defendant James M. McDonald upon certain of the causes of action pleaded, but as to the causes of action assigned to plaintiff by Lewis Merrill, B. G. Ruhl & Co. and Annie White, and as to his own claim, the court gave judgment for defendant. Plaintiff appeals from the judgment only as to the assigned claims of Merrill, Ruhl & Co., and White.

The original complaint was filed June 19, 1895, and the amendments were filed May 19, 1897. The court below held the last-mentioned assigned causes of action barred by subdivision 1 of section 338 and section 359 of the Code of Civil Procedure. It is conceded by appellant that if the amendments state a new cause of action the judgment should be affirmed; otherwise all parties agree that it should be reversed. The three years statute of limitations applies to

deposits made more than three years before the commencement of the action (*Wells v. Black*, 117 Cal. 157; 59 Am. St. Rep. 162); and it is settled law that a new cause of action cannot be introduced into a complaint under the guise of an amendment so as to evade the statute. (*Atkinson v. Amador etc. Canal Co.*, 53 Cal. 102; *Meeks v. Southern Pac. Co.*, 61 Cal. 149.) It is equally well settled that if no new cause of action is stated in the amendments to the original complaint, the amendments simply supersede the original by more fully setting forth the cause of action defectively alleged in the original complaint whose identity is in no way affected. (*Barber v. Reynolds*, 33 Cal. 501; *Vanderslice v. Matthews*, 79 Cal. 277; *Cox v. McLaughlin*, 76 Cal. 60; 9 Am. St. Rep. 164.)

The court found that on June 22, 1893, the Pacific Bank was indebted to Ruhl & Co. in the sum of two thousand two hundred and eighty-six dollars and eighteen cents on account of money deposited with the said bank; that in plaintiff's original complaint he alleged that Ada P. Ruhl on June 22, 1893, deposited in the bank the sum of eleven hundred and forty-three dollars and nine cents, and also that L. Dallman on the same day deposited a like sum, which was within three years from the filing of the original complaint (these two sums equal the deposit made by Ruhl & Co.); that on May 19, 1897, plaintiff obtained leave to amend his complaint in respect of said two deposits, "on the ground of mistake in the statement of the names in which the original deposits were made," and the amendment was accordingly made "wherein it was alleged that the said Pacific Bank was, on the twenty-second day of June, 1893, indebted to B. G. Ruhl & Co. in the sum of two thousand two hundred and eighty-six dollars and eighteen cents for and on account of money delivered to and deposited with said Pacific Bank by said B. G. Ruhl & Co. within three years prior to the commencement of this action." That Ruhl & Co. assigned their claim to B. G. Ruhl and Minnie Dallman, and Ruhl and Dallman assigned to Ada P. Ruhl and she to plaintiff, all prior to the commencement of the action; the court finds "that all of said sum was delivered to and deposited with said Pacific Bank by said B. G. Ruhl & Co. prior to June 22, 1893, and more than three years prior to the date of

filing of said amendments, and that neither said Minnie Dallman nor said Ada P. Ruhl was a member of said firm of B. G. Ruhl & Co., but said B. G. Ruhl and L. Dallman were members thereof."

The cause of action as to Annie White is in a similar situation. The court found that on June 22, 1893, the bank was indebted to C. W. Burgess in the sum of four hundred and sixty-three dollars and thirty cents deposited by him within three years prior to the commencement of the action; that when the action was commenced plaintiff alleged in his complaint that on June 22, 1893, the bank was indebted to Annie White in the sum of four hundred and sixty-three dollars and thirty cents, deposited by her within three years prior to the commencement of the action; that on May 19, 1897, plaintiff obtained leave to amend his complaint on the ground of mistake in the statement of the name in which the original deposit was made, and an amendment was filed alleging the indebtedness to Burgess as the depositor and that he had assigned his claim to Annie White and she to plaintiff, both assignments being prior to the commencement of the action. It appears from the findings that the bank failed and closed its doors June 23, 1893, and ever since has refused to pay its depositors.

Appellant claims that he was not called upon the plead the chain of title to this money; that had he alleged the ultimate fact of the indebtedness of the Pacific Bank to him at the commencement of the action, it would have been sufficient; that he erroneously stated that the particular money sought to be recovered was deposited by one of plaintiff's assignors, rather than another prior assignor, which was but an error in description, and that the description was necessary only to identify the claim sued on and was not necessary in the pleading, for the fact was as alleged that plaintiff was the owner of the claim when the suit was commenced. Furthermore, it is claimed that no injury could have accrued to defendant from this error in description. Respondent replies that the complaint correctly states each claim as a separate cause of action; that the bank was not indebted to plaintiff on the assigned claims, as himself a depositor, but that the claim of every depositor was a chose in action belonging to him which the depositor alone could assign;

that the bank was liable to the depositor in the first place, and defendant, as a stockholder, was liable for his proportion of that particular debt; that the assignee could recover only by proving the particular liability of the bank and that he was owner of the claim, and to prove this he must allege the facts, because the plaintiff must allege every fact that he is required to prove (citing *Green v. Palmer*, 15 Cal. 411; 76 Am. Dec. 492); that a suit to recover the proportion of the debt due to A will not lie to recover the proportion of the debt to B, for the causes of action are different.

It is true that plaintiff derives his right to sue from the depositor; but it is also true that, before the action was commenced, he obtained the assignment of the real depositor, and in his complaint he correctly described and identified the deposit or indebtedness for which he sued; he failed to state correctly the name of the depositor while correctly stating the name of his assignor, who was not in fact the depositor. The cause of action was the debt owing by the bank, and by the amendment this cause of action was not changed but was identical in point of amount and time when accrued with that stated in the original complaint. That plaintiff made a mistake in describing the person through whom he derived title was not so material as to make the correction by amendment the statement of a new and different cause of action. In *Heilbron v. Heinlen*, 72 Cal. 376, where the complaint in ejectment described the land as in range 19 east, the court allowed an amendment showing the range to be 20 east, and held that the correction of the mistake was authorized by section 473 of the Code of Civil Procedure, and did not substitute a new and different cause of action. (See, also, *Bulwer etc. Co. v. Standard etc. Co.* 83 Cal. 613.) In the case of *Cox v. McLaughlin*, *supra*, an amendment was allowed by which there was added to the original cause of action for the contract price of services a claim on *quantum meruit* for the same services. The principle upon which the court proceeded was that no new facts were stated in the amendment upon which a new cause of action was based. And so here we find no new facts except a mistake in the name of the depositor. The bank's indebtedness and the indebtedness sued upon are the same. The amendment could in no way have prejudiced

respondent, for the indebtedness of the bank and the statutory liability of the stockholders therefor, as shown by the amendments, fully appeared in the original complaint. Respondent could have shown at the trial, if it were the fact, that the amendments alleged a different deposit or indebtedness from that pleaded in the original complaint, and this would have shown a cause of action different in its nature from that alleged. But the fact was they were the same except as to the misdescription of the depositor, which we do not think went to the nature or scope of the cause of action.

The court found that the claim of Lewis Merrill had not been assigned to plaintiff and that he was not the owner or holder thereof. This finding is not questioned in plaintiff's brief, nor can it be on this appeal.

The judgment should be reversed as to the claims represented by the depositors B. G. Ruhl & Co. and Annie White, and as to the remaining portion of the judgment it should be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed as to the claims represented by the depositors B. G. Ruhl & Co. and Annie White and as to the remaining portion of the judgment it is affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[Sac. No. 693. Department Two.—December 13, 1899.]

D. J. HOULT, Appellant, v. ROBERT RAMSBOTTOM et al., Respondents.

NOTE—MORTGAGE AS COLLATERAL SECURITY—FORECLOSURE—BID IN INTEREST OF PRINCIPAL DEBTOR—ACCOUNTING—TRUST.—Where a loan evidenced by a note given by direction of the lender to his agent was collaterally secured by a note and mortgage for a much larger sum assigned to the same agent, which was foreclosed by the agent under an agreement with the principal debtor that the bid should not be less than the amount thereof, for his benefit, such debtor is

not entitled to demand an accounting and payment of the surplus of the collateral note and mortgage above the original debt secured, and a decree declaring that the land purchased under the foreclosure, and the deficiency judgment therein, are held in trust by the agent as security for the principal debt, and refusing an accounting, will be affirmed upon appeal of the debtor therefrom.

ID.—COLLECTION OF COLLATERAL SECURITY—RIGHT OF DEBTOR TO ACCOUNTING.—The holder of a mortgage as collateral security may foreclose the lien, and, if he does so of his own motion, without fraud, he takes the absolute legal title to the property free from any trust therein, and must account to the debtor for the proceeds, if there is any surplus thereof. But where the bid is made larger than it otherwise would be at the request of the debtor, and for his benefit in respect of the amount of the excess, it would be inequitable to compel an accounting of the surplus, which existed only by reason of the act of the debtor; and he must be limited in such case to a right of redemption upon paying the principal debt, or to a right to have the trust property sold and the proceeds ratably apportioned.

ID.—HARMLESS REJECTION OF EVIDENCE.—The rejection of evidence as to the relations between the lender and his agent, which could not in anywise prejudice the rights of the appellant, under the findings and decree entered in his favor, or entitle him to any relief other or greater than that awarded, cannot be ground for reversal upon his appeal.

APPEAL from a judgment of the Superior Court of San

Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion.

Minor & Ashley, and A. H. Ashley, for Appellant.

Elliott & Elliott, for Respondents.

CHIPMAN, C.—Plaintiff brings this action for an accounting with defendant Ramsbottom; also for judgment against him for the surplus resulting from the proceeds coming into his hands upon the foreclosure of certain mortgages held by him as collateral security for plaintiff's debt; also for an assignment to plaintiff of a certain deficiency judgment arising out of said foreclosure proceedings, and for general relief. The court found as facts that Ramsbottom loaned plaintiff two thousand dollars and directed plaintiff to execute and deliver to defendant Summerville his promissory note therefor,

which was done; that as security for said note Ramsbottom directed plaintiff to assign to Summerville a certain note executed by W. J. and J. F. Hoult to plaintiff for five thousand five hundred dollars, together with a certain mortgage on real estate and a certain chattel mortgage, both given by said W. J. and J. F. to plaintiff to secure said last-mentioned note; that Summerville had no interest in the transaction and was acting merely as Ramsbottom's agent, except that subsequently in certain foreclosure proceedings he acted, through his attorney, defendant Webster, for the benefit of plaintiff. Summerville foreclosed the mortgage on the real estate, and the property was sold by a commissioner and was bid in by Summerville, the plaintiff in the action, for five thousand five hundred dollars; a certificate of purchase of the land was issued to him and for the deficiency Summerville had a judgment. As to this sale the court found that Summerville made the bid and purchase for said sum and took the certificate in his own name while acting, "as in the matter of said two thousand dollar note for the benefit of Ramsbottom," and that he, Summerville, had no interest whatever in the purchase; that the foreclosure proceedings were conducted by Webster as Summerville's attorney of record, and said bid and purchase were made by Summerville through Webster, under an agreement with plaintiff "that said foreclosure proceedings should be conducted in Hoult's (plaintiff's) interest, and that five thousand five hundred dollars of the judgment in said proceedings in favor of D. J. Hoult (plaintiff) should be bid and used in the name of Summerville at the foreclosure sale"; that Webster was employed and paid cash in part by plaintiff to foreclose the mortgage, and was promised a further fee if it could be realized from the judgment; that the bid was made for the accommodation of Webster, Summerville, Ramsbottom, and plaintiff as above stated, and "in pursuance of the premises described in the undenied allegations of the complaint." What these "premises" or "undenied allegations" are the court does not point out. The admissions, so far as we discover, are that Summerville paid no money on account of the purchase; that the judgment in the foreclosure was for six thousand four hundred and seventeen dollars and fifteen cents and that he bid five thousand five

hundred dollars, and that Summerville was credited by the commissioner this amount, and that the certificate of purchase was issued to Summerville. It is further found that plaintiff joined in the receipt given the commissioner for the five thousand five hundred dollar bid under the agreements hereinbefore mentioned; that prior to the commencement of this action Summerville "orally offered to assign to plaintiff said certificate for less than the amount of said two thousand dollar note"; that Summerville has never assigned the certificate to Ramsbottom, but now holds it "precisely as between himself and Ramsbottom he held the two thousand dollar note—i. e., for the benefit of Ramsbottom—he, Summerville, having no beneficial interest therein." It appears that the personal property held in pledge was also sold to Summerville, upon proper proceedings had, as to which sale the court finds that he acted for Ramsbottom and had no beneficial interest himself therein; the court finds that prior to the commencement of this action the two thousand dollar note was not canceled or satisfied, nor was there deducted from the proceeds of the pledged property the amount due upon this note. There was a deficiency judgment docketed against the Houltts in the foreclosure proceeding, as to which the court finds that neither Summerville nor Ramsbottom has ever been ready or willing to assign the same, "save upon the condition that the plaintiff herein pay the full amount due and unpaid upon the two thousand dollar note," on which there appears to have been certain payments made amounting to six hundred and seventy-eight dollars, including, as we understand the evidence, the proceeds of the sale of the personal property sold under the chattel mortgage.

As conclusions of law, the court found that Summerville holds the title to the land purchased on foreclosure "in trust as security for, and for the purpose of securing the payment of," the two thousand dollar note in question; and also holds the deficiency judgment "in manner and for the purposes above stated," and that "plaintiff is entitled to a decree declarative that said Summerville has and holds the said land and said deficiency judgment in the manner and for the purpose above stated"; that plaintiff is entitled to his costs from Summerville and Ramsbottom, and is entitled to no further

relief Judgment was accordingly entered, from which and from an order denying his motion for a new trial plaintiff appeals.

It was said in *Kelly v. Matlock*, 85 Cal. 122, that "the holder of a mortgage as collateral security, who causes the property to be sold on execution, and himself becomes the purchaser, does not hold the title as a trustee for his debtor, unless it is shown that he obtained the title by some fraudulent means. He cannot sell an evidence of debt of this kind, but may collect the same when due. (Civ. Code. sec. 3006.) And to that end he may foreclose the lien, and himself become the purchaser. (Civ Code, sec. 3011.) If so, and no fraud is shown, he takes the absolute title to the property, and must account to the debtor for the proceeds." If Summerville in the present case had foreclosed his collateral mortgage on his own motion, as he had the right to do, and had bid in the property at five thousand five hundred dollars, no fraud appearing, he would have taken the absolute title to the property (subject, of course, to redemption of the mortgagors) and would have been compelled to account to plaintiff for the proceeds, i. e., the amount bid, which would, perhaps, have entitled plaintiff to what he now seeks. But the facts as found by the court upon, as we think, sufficient evidence, show that Summerville bid five thousand five hundred dollars at the request of plaintiff, who himself with Summerville receipted to the commissioner for that amount, no money in fact passing, and the bid was thus made in excess of plaintiff's debt to Summerville for the benefit of plaintiff in the very amount of this excess now claimed by him. The evidence is that but for the agreement between plaintiff and Summerville, made with the attorney Webster, on plaintiff's behalf, the bid would have been only enough to cover the debt of plaintiff to Summerville. The trust found by the court does not arise by reason of the fraud of Summerville, for no fraud was alleged or proved, but it arises from the agreement by which Summerville took the title by purchase at foreclosure sale, and by which Summerville, as Ramsbottom's agent, had an interest in the property to the extent of the unpaid balance due on the two thousand dollar dote to plaintiff, and plaintiff had an interest to the extent of the excess by reason of his

being the owner of the five thousand five hundred dollar collateral mortgage note and as mortgagee of its makers. We do not see how plaintiff can claim, on the facts found, that he should be paid in money the difference between the two above amounts; nor can we see any occasion for an accounting at this time. We think the decree accords to plaintiff his full rights. He may pay to Summerville the balance due the latter, and he would then be entitled to a conveyance of the land and an assignment of the deficiency judgment; or he may, by appropriate proceedings, have the trust properly converted into money and the proceeds ratably apportioned. It would certainly be most inequitable to compel Summerville to account in money for a surplus which nominally exists by reason alone of plaintiff's acts, but which, by reason of depreciation in values since the purchase, may not now in fact exist at all. Many of the findings of fact are challenged as not justified by the evidence. Upon the principal question—whether Summerville bid five thousand five hundred dollars for the mortgaged property upon the agreement found—the evidence is conflicting. It was clearly testified to by Webster and was denied by plaintiff when on the witness stand. The receipt given the commissioner, as well as some other circumstances, tend to corroborate Webster's testimony. We are not at liberty to attempt a reconciliation of this conflict. Upon an examination of the record we cannot say there was not sufficient evidence to justify the findings.

At the trial plaintiff attempted in many ways to show the relation existing between Ramsbottom and Summerville in respect of the transactions, but the court refused the evidence, and the rulings are now claimed to be error. The fact alleged and sought to be proved by plaintiff came out, and the court found that Summerville was acting as the agent of Ramsbottom and that Summerville, had no beneficial interest in the loan or in the securities. As the case resulted and as the facts appeared, we cannot see that plaintiff was in any wise injured by the rulings of the court. There was no dispute that plaintiff got the money and that it was loaned to him by Ramsbottom; that he gave his note therefor to Summerville and assigned the collaterals to Summerville as security in the capacity of agent. Plain-

tiff's rights turned chiefly on the question whether the bid made at the foreclosure sale was for plaintiff's benefit and by his direction and upon the agreements alleged by defendants. Upon this point plaintiff testified as to his conversation about the sale with Webster, who was managing the foreclosure, and he testified that he had no conversation with Ramsbottom or Summerville relative thereto. We have examined the assignments of error in excluding and admitting evidence, but cannot discover wherein plaintiff was injured by the rulings of the court, conceding that some of the rulings were error. We can discover no fact which plaintiff sought and was refused permission to prove that would have entitled him to greater relief than he finally was awarded.

Upon the whole case we are of opinion that the judgment and order should be affirmed, and so advise.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[L. A. No. 590. Department Two.—December 13, 1899.]

E. E. KEECH, Assignee, etc., Appellant, v. **RICHARD BEATTY** et al., Respondents.

INSOLVENCY—REFLEVIN BY ASSIGNEE—SUPPLEMENTAL ANSWER—JUDGMENT IN ANOTHER ACTION—RES ADJUDICATA.—In an action of replevin brought by an assignee of insolvent debtors to recover property sold at sheriff's sale by preferred creditors, the defendants may be allowed to set up by supplemental answer that, in another action commenced in another county by the assignee to recover the same property against two of the same defendants, judgment had been rendered in favor of the defendants and against the plaintiff. Such judgment is *res adjudicata*, and operates as an estoppel between the parties thereto, whether erroneous or not.

ID.—EVIDENCE—OPINION OF JUDGE—LEGAL EFFECT OF JUDGMENT.—The opinion of the judge rendering the judgment relied upon as an estoppel is not admissible to control the legal effect of the judgment.

ment where the record shows that the cause of action and the parties are the same, as respects the plaintiff and two of the defendants to the present action.

ID.—FINDINGS—DEFEAT OF RECOVERY.—Where the court finds upon sufficient evidence in favor of the defense of *res judicata* as to two of the defendants, and that the only other defendant did not have in his possession any of the property described in the complaint at the commencement of the action, and that plaintiff is not, and never has been, the owner, nor entitled to the possession of the property, the plaintiff is not entitled to recover.

ID.—CONSISTENCY OF FINDINGS—PURCHASE AT SHERIFF'S SALE—INTENDED PREFERENCE BY INSOLVENTS—ESTOPPEL BY JUDGMENT—OWNERSHIP.—Findings that one of the defendants purchased the property described in the complaint at sheriff's sale, and had disposed of a large part of it before the commencement of the action, and that he and another defendant, parties to the suit in which the other judgment was rendered, seized the property upon execution, for the purpose of obtaining a preference, having reasonable cause to believe the debtors insolvent, are not inconsistent with the findings that the judgment is an estoppel between the parties thereto, and that the plaintiff is not, and never has been, the owner of, nor entitled to the possession of, the property.

APPEAL from a judgment of the Superior Court of Orange County. J. W. Ballard, Judge.

The facts are stated in the opinion.

Graves, O'Melveny & Shankland, for Appellant.

The complaint having stated the facts, the recovery ought not to be based merely upon the question of possession of defendants at the commencement of the action, but the recovery should be for the value of the property converted. (*Luhrs v. Kelly*, 67 Cal. 289; *Washburn v. Huntington*, 78 Cal. 573; *Burke v. Koch*, 75 Cal. 356; *Bull v. Houghton*, 65 Cal. 422; *Grunsky v. Parlin*, 110 Cal. 179; *Bernheim v. Christal*, 76 Cal. 567.) Any preference by an insolvent debtor is void, as against the assignee. (*Salisbury v. Burr*, 114 Cal. 455.) The record of the suit in the superior court of Los Angeles county does not show an adjudication of the same subject matter as that here involved. No evidence was given of insolvency in that case, but it was tried upon a different claim, and was not an adjudication upon the merits of the title to the property, and is not a bar to this action. (*Barnum v. Reynolds*, 38 Cal. 643; *Oakland v. Oakland*

Water Front Co., 118 Cal. 222; *Hooker v. Thomas*, 86 Cal. 176; Code Civ. Proc., sec. 1908, subd. 2, sec. 1911.)

Brousseau & Montgomery, and James G. Scarborough, for Respondents.

There was no joint wrongdoing, and the acts of the purchaser cannot bind or prejudice his codefendants. (Code Civ. Proc., sec. 1848; *Kilburn v. Ritchie*, 2 Cal. 145; 56 Am. Dec. 326; *Dean v. Ross*, 105 Cal. 227, 231.) The plaintiff is bound by the case made in the complaint, and the relief therein prayed for determines the nature of the action as one of replevin. (*Nevada etc. Co. v. Kidd*, 37 Cal. 282.) The plaintiff cannot succeed as against a defendant not in possession at the commencement of the action. (*Riciotto v. Clement*, 94 Cal. 105.) The record in the other suit shows that the causes of action were identical, and, being brought by the same plaintiff against the same defendants, the judgment is a bar to this action. (*Taylor v. Castle*, 42 Cal. 367; *Ferrea v. Chabot*, 63 Cal. 567; *Hall v. Susskind*, 109 Cal. 203; *Woolverton v. Baker*, 98 Cal. 628.) The fact that there are more defendants in the second action, does not affect the bar in favor of the same defendants in both actions. (*Rehman v. New Albany etc. Ry. Co.*, 8 Ind. App. 200; *Atkinson v. State Bank*, 5 Blackf. 85; *Mullen v. Mullock*, 22 Kan. 598; *Beyersdorf v. Sump*, 39 Minn. 495; 12 Am. St. Rep. 678; *Memphis v. Dean*, 8 Wall. 64.) The fact that the other action was commenced after the present suit does not render the first judgment any less a bar to a second contrary judgment. (*Martin v. Walker*, 60 Cal. 94; *Bolander v. Gentry*, 36 Cal. 105; 95 Am. Dec. 162; *North Bank v. Brown*, 50 Me. 214; 79 Am. Dec. 609.) The opinion of the judge was not admissible to contradict the judgment-roll in the other action. (*Hobbs v. Duff*, 43 Cal. 490; *Wilson v. Wilson*, 45 Cal. 399; *Haggin v. Clark*, 71 Cal. 444.)

COOPER, C.—This is an appeal from a judgment made and entered in the superior court of Orange county in favor of defendants, and comes here on the judgment-roll and a bill of exceptions. The action was brought to recover the possession of specific personal property, or, in case a delivery cannot be had, the value thereof. The findings show the

facts substantially as follows: On the tenth day of May, 1895, John Beatty, Jr., and Robert Beatty, as copartners, being the owners of a stock of merchandise, notes, and accounts of the value of five thousand six hundred and fifty dollars, were insolvent and unable to pay their debts as they became due, and on said day they procured the said stock of merchandise to be levied upon and seized by virtue of two executions against them issued on two separate judgments which had been duly given and made, one in favor of the First National Bank of Santa Ana, and the other in favor of one Richard Beatty. That the said copartners procured the said property to be levied upon with a view of giving the said judgment creditors a preference, and that the said judgment creditors, at the time of the issuing and levy of the said executions, had reasonable cause to believe that said copartners were insolvent and that the said levy under said executions was made to prevent the property from coming to the assignee in insolvency and to delay and impede the operation of the Insolvent Act of 1880. On the eighteenth day of May, 1895, more than five creditors of the said copartners filed their petitions in the superior court, in due form and properly verified, asking to have said copartnership adjudged insolvent under the provisions of the Insolvent Act of 1880.

On the twenty-third day of May, 1895, the defendant Crookshank, at sheriff's sale, under the executions hereinbefore referred to, became the purchaser of the property described in the complaint and took possession thereof at said time, and at the time of said sale the said Crookshank had notice of the fact that the said copartners were insolvent and that a petition had been filed to have them adjudged insolvent as herein stated.

This action was commenced April 13, 1896, and at the time of its commencement the defendant Crookshank had in his possession only a remnant of the said goods and merchandise, the total value of which did not exceed seven hundred and fifty dollars, and neither of the other defendants had any part of the said property in their possession. On March 18, 1896, the plaintiff, having been duly elected assignee of the said insolvent copartners, took the proper oath, duly qualified and entered upon the discharge of his

duties as such assignee, and on the same day the clerk of the court, in pursuance of the statute, duly conveyed by instrument in writing, all the property of said insolvent copartners to the plaintiff as such assignee. On the eighth day of June, 1896, the plaintiff, as assignee, commenced an action against the defendants Crookshank and the defendant bank in the superior court of Los Angeles county to recover the value of the same property described in the complaint in this action, and the said defendants in said last-named action duly filed their answer. That the said action so commenced in the superior court of Los Angeles county was by the same plaintiff who is the plaintiff in this action, and in the same right, and was against two of the same defendants who are defendants in this action, and involved the same property and subject matter as that in litigation here. That the said action so brought in the superior court of Los Angeles county resulted in a judgment, on the sixteenth day of March, 1897, duly given and made in favor of the defendants therein and against the plaintiff, and by the judgment it was duly adjudged and decreed that the defendant Crookshank was the owner and had valid title to the said property, and that plaintiff was not, and never had been, the owner of the said property nor any part thereof.

The court in this case further found that the plaintiff is not, and never has been, the owner of the property described in the complaint nor any part thereof, nor entitled to the possession thereof.

As conclusions of law, the court found that the judgment so rendered on the sixteenth day of March, 1897, in the superior court of Los Angeles county, was and is final, and is a bar to the present action as to defendant Crookshank and the defendant bank; that plaintiff is not entitled to recover, and that defendants are entitled to judgment. The judgment is clearly the legal conclusion from the facts found. The greater portion of the plaintiff's brief is devoted to arguing the insufficiency of the evidence to support portions of findings Nos. 5, 6 and 7.

We have carefully read the evidence, and we think the evidence supports the findings. The defendants, by leave of

court, were allowed to file supplemental answers in which they set up by way of plea in bar judgment rendered against plaintiff by the superior court of Los Angeles county on March 16, 1897. The plaintiff objected to the filing of the supplemental answers on the ground that they were immaterial, and demurred to them after they were filed upon the ground that they did not state facts sufficient to constitute a defense. The objection was overruled and so were the demurrers. It is now urged that the rulings were erroneous because "the supplemental answers reveal the lack of identity of issuable facts."

The supplemental answers show that the same plaintiff who is now plaintiff, and in the same right, commenced the action in the superior court of Los Angeles. The answers each set up a copy of the complaint in the action commenced in Los Angeles. The description of the property in that case as contained in paragraph 2 of the complaint is of the identical property described in the complaint in this case, and in each case the goods and merchandise are described as in "the business, store, and salesroom No. 202 West Fourth street, at the southwest corner of Fourth and Sycamore streets, in the said city of Santa Ana." The answers show that in the Los Angeles case the plaintiff made the same allegations as to his appointment as assignee, qualifications, etc., as he has made in the present case. The supplemental answers further expressly allege that the persons, property, and transactions set forth in plaintiff's complaint in Los Angeles "are identically the same as those described and set forth in the complaint filed in this action." The orders of the court allowing the supplemental answers to be filed and overruling the plaintiff's demurrers thereto were correct. The answers showed that the issuable facts in the case in which the final judgment was rendered were the same as in the case at bar. The record does not show that any objection was made to the answers being filed on the grounds urged by plaintiff in his brief. The objection was that they were immaterial. Neither does the record show that any such ground was urged on demurrer. The demurrers were solely upon the ground "that the same did not state facts sufficient to constitute a defense." The plaintiff at the trial offered in evidence the written opinion of

the judge of the superior court of Los Angeles county in the action which resulted in a final judgment against plaintiff in that county "for the purpose of showing the nature of that action and the issues which were submitted to the court for its consideration."

The defendants objected upon the ground that the opinion was incompetent, irrelevant, and immaterial, and no part of the record in that case. The court sustained the objection, and the ruling is now claimed to be error. The opinion of the judge was no part of the record. If it be conceded that parol evidence may be given as to what the issues were in the former suit, the parol evidence would have to be competent. The written opinion, without even the form of having been made under oath, was not competent evidence for the purpose for which it was offered. It is urged that the estoppel in the former case could not apply to defendant Beatty for the reason that he was not a party thereto. The court below did not find as a conclusion of law, or otherwise, that the former judgment was a bar as to defendant Beatty. It did find, however, that defendant Beatty did not have in his possession at the time of the commencement of this action any of the property described in the complaint. In such case in an action in claim and delivery the plaintiff cannot recover. (*Riciotto v. Clement*, 94 Cal. 105.)

It further found that plaintiff is not and never has been the owner nor entitled to the possession of the property. In such case he is not entitled to recover. (*Cardinell v. Bennett*, 52 Cal. 476; *Fredericks v. Tracy*, 98 Cal. 658.)

The findings are not inconsistent. Finding 5 shows that defendant Crookshank purchased the property described in the complaint at sheriff's sale on May 23, 1895, and took possession of it, but that he had sold and disposed of all of it, except a remnant worth about seven hundred and fifty dollars, prior to the time this action was commenced. This is not inconsistent with the finding of estoppel by reason of the former suit, neither is it inconsistent with finding 7 that plaintiff is not and never has been the owner of nor entitled to the possession of the property. The finding that defendants, the bank and Beatty, seized the property upon executions with a view to obtain a preference, and that at the time

they had reasonable cause to believe the copartners to be insolvent, is not inconsistent with the finding of the estoppel by reason of the former judgment between the same parties and involving the same subject matter. The former judgment may have been erroneous, but it being a final judgment its effect as *res judicata* is none the less binding in this case. (Freeman on Judgments, sec. 249; Bigelow on Estoppel, 5th ed., 261.)

We advise that the judgment be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 786. Department Two.—December 13, 1899.]

In the Matter of the Estate of JOHN HEDRICK, Deceased,
GEORGE M. FRINK; Administrator, Appellant, v.
HEIRS OF JOHN HEDRICK, Respondents.

ESTATES OF DECEASED PERSONS—ACCOUNTS OF ADMINISTRATOR—AMOUNT OF EXPENDITURES WITHOUT VOUCHERS.—Under section 1632 of the Code of Civil Procedure, the items of expenditure by an administrator, for which no vouchers are produced, but which may be allowed him on his accounting, are expressly limited to items each of which does not exceed twenty dollars, and not aggregating in excess of five hundred dollars. A larger aggregate cannot be allowed, notwithstanding proof of the items in excess may be adduced in corroboration of the administrator's oath as to their correctness.

ID.—SEMI-ANNUAL RETURNS OF PUBLIC ADMINISTRATOR—ACCOUNT STATED—RIGHTS OF HEIRS.—The semi-annual statements required to be returned by the public administrator, under section 1736 of the Code of Civil Procedure, are not intended to be settled as statements of account, and cannot be treated as accounts stated, or as concluding the rights of the heirs, who may contest any unlawful items contained therein upon the final settlement of the accounts of the public administrator.

ID.—STIPULATION OF HEIRS AS TO RETURNS—CONTEST OF ITEMS UNVOUCHED FOR.—A stipulation of the heirs that each of the returns shows that during the time embraced therein "the administrator duly paid out, as expenses in this estate," the aggregate amounts included therein, aggregating a sum total, in all of the returns, and further stipulating that the items embraced in the amended final account were correct, excepting an aggregate sum stated, which was contested, and which appears at the hearing to be made up of items of expense in the respective returns for which no vouchers

were given, is not to be construed as admitting conclusively the correctness of such contested items, but as only admitting that the returns showed certain total expenses for given periods.

ID.—REFUSAL OF EXTRA COMPENSATION—DISCRETION OF COURT.—The action of the court in refusing an allowance of extra compensation to the administrator will not be disturbed upon appeal, where the evidence discloses no abuse of discretion by the court.

APPEAL from an order of the Superior Court of Riverside County settling an administrator's account and from an order denying him extra compensation. J. S. Noyes, Judge.

The facts are stated in the opinion.

Furington & Adair, and Elmer E. Rowell, for Appellant.

W. J. McIntyre, for Respondents.

CHIPMAN, C.—Appeal by the administrator from an order settling his final account and from an order denying him extra compensation.

1. Appellant was public administrator and became administrator of this estate by virtue of his office in the year 1893. He filed eight semi-annual returns as required by section 1736 of the Code of Civil Procedure—the first being “for the term commencing December 1, 1893, and ending June 1, 1894,” and the last being “for the term commencing June 1, 1897, and ending December 1, 1897.” These returns, as the statute calls them, do not appear in detail, but it is agreed and stipulated that each one “shows that during said term (i. e., the term embraced in each return) the administrator duly paid out as expenses in this estate” a certain sum total, the several amounts of which are given. The administrator filed his final account April 23, 1898, and on July 13, 1898, he filed an amended final account, which latter was the account heard and determined. The following stipulation was entered into at the hearing: “It is stipulated that all the items of credit contained in the amended final account . . . excepting the item of \$2,090.18, are correct, the same having been gone into at the former hearing of the first final account herein filed.” Appellant claims, as the result of the foregoing stipulation, that respondents admitted the correctness of

the expenditures as shown by these semi-annual returns, and, as they form the total of the principal items in the amended final account, their correctness as to that account is also admitted. We cannot so regard this stipulation. This item of \$2,090.18 was expressly and specifically contested, and much, indeed most, of the evidence was addressed to that item with a view to make legal proof of its correctness and to show that the administrator should be credited with it. The manifest object of the stipulation, as to the semi-annual returns, was to show that they contained a statement of expenses and their amount for each period, but it was not intended by the contesting parties that they should be received as conclusively showing the expenditures to be just and proper and as duly established by vouchers. The stipulation went no further than to admit that the returns showed certain total expenses for given periods.

2. The contestants are the heirs at law of the deceased, and the contested item in the account reads as follows: "By amount paid out for expenses of keeping up and properly caring for the estate as per semi-annual exhibits of administrator, filed herein as follows: June 1, 1894; December 6, 1894; June 1, 1895; December 1, 1895; June 1, 1896; December 1, 1896; June 1, 1897; December 1, 1897—\$2,090.18." The administrator testified that this amount was "made up of money paid out for the benefit of the estate for which there are no vouchers. I get that amount from the regular reports made semi-annually to this court." He explained that he arrived at the above sum by subtracting from the totals of each semi-annual report the amount for which he had vouchers at the hearing and adding these different amounts together. He testified that he could only give a general idea of how these different amounts of money were paid out. In one case he said "It was paid out for car fare and buggy hire and little things for the ranch—paid out in cash." In another instance he added to these purposes "for improvements." Again he testified: "In those instances where I testify that these different balances were expended for the benefit of the estate, it would be impossible to remember the items and the persons to whom I paid them, and the places where I paid them." He further testified that the items enter-

ing into the first five of his semi-annual reports were taken from a regular account-book and cash-book; that this cash-book has since been lost and he has been unable to find it; that this book contained the items of expense now charged for, and that he now has no memoranda of any of the items for which he has no vouchers. He testified that the money was expended for the estate and he personally derived no benefit from any of the expenditures. Some testimony was introduced to corroborate the testimony of the administrator. Section 1632 of the Code of Civil Procedure provides as follows: "On the settlement of his account he (the administrator) may be allowed any item of expenditure not exceeding \$20 for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed \$500 against any one estate," etc.

Appellant contends that by a fair construction the statute must be held to mean that the limitation of \$500 applies only to such items in excess of that sum as have no support other than the oath of the administrator. He may support his account by his own "uncontradicted oath" to that extent and no more; but that where he supports his account by his own oath and by satisfactory proofs other than and corroborative of this oath, the excess over \$500, no matter how much it may be, must be allowed in the settlement of his accounts. We cannot accept this construction of the statute. Its language is plain and unambiguous and means, as we conceive, that the administrator may support his account as to an item not exceeding \$20, for which he has no voucher, "by his own uncontradicted oath to the fact of payment, specifying when, where, and to whom it was made," to the extent in all of \$500. Beyond that limit he must support the account by vouchers, and no amount of corroboration of his oath to the expenditures by the testimony of other witnesses will avail to dispense with vouchers; and as to the \$500 he must show when, where, and to whom the disbursement was made. This is the plain and obvious reading of the statute, which, so far as we are aware, has never been questioned by this court. Such loose and unsatisfactory statements as those made by the administrator, as to when, where, and to whom he made

the disbursement, are wholly insufficient. The administrator was confessedly unabel to make the statutory proofs and must abide the consequences of his failure to do so.

3. Appellant claims that the semi-annual returns made under section 1736 of the Code of Civil Procedure must be treated as accounts stated and conclusive against the respondents (citing *Hendey v. March*, 75 Cal. 567), for the reason that they were aware that these returns had been made and filed and had made no objection to them. Respondents were nonresidents, and it is claimed that their resident attorney here, Mr. Harvey Potter, examined the returns from time to time and made no objection to them and that he sent two or three of them to the attorney of respondents at their place of residence. We do not think that the return to be made by the public administrator, required by section 1736, could under any circumstances be treated as an account stated. It is wholly different from the accounts required to be made by administrators and for a wholly different purpose, and is not intended to and does not take the place or serve the purpose of the semi-annual accounts required by section 1622 of the Code of Civil Procedure and sections following. Before even these latter accounts can be conclusive they must be heard by the court and its order made determining their correctness. The "return" spoken of in section 1736 is not an account in the sense that these other accounts are such; it is not made to the court; there is no hearing upon it and no order of the court required as to it. No heir is bound by it, nor does it conclusively establish any fact stated in it as against an heir. The account mentioned in *Hendey v. March*, *supra*, was an account stated between two persons having pecuniary relations with each other and was an entirely different account from the official return of the public administration in the case before us.

4. The evidence as to appellant's right to extra compensation discloses no abuse of discretion by the court in refusing this allowance. The order must, therefore, stand. (Code Civ. Proc., sec. 1618.)

It is advised that the orders appealed from be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the orders appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[L. A. No. 766. Department Two.—December 13, 1899.]

H. A. BARCLAY, Respondent, v. J. C. BLACKINTON,
Administrator, etc., Appellant.

ESTATES OF DECEASED PERSONS—ACTION UPON WRITTEN PROMISE OF DECEDENT—STATUTE OF LIMITATIONS.—An action upon a written promise of a decedent to pay money, brought more than four years and nine months after its maturity and one year and eight months after the issuance of letters of administration, is barred by the terms of sections 337 and 353 of the Code of Civil Procedure.

ID.—STATUTORY SUSPENSION—PRESENTATION AND REJECTION OF CLAIM—RIGHT OF ACTION.—In such case, there is no statutory suspension of the right of action, beyond the period of ten days after presentation of the claim, after which action may be brought as upon a rejected claim; and the limitation of one year after the issuance of letters of administration, operating to extend the general statute of limitations, cannot be further extended by the neglect of the administrator to indorse a formal rejection of the claim thereupon.

ID.—SPECIAL STATUTORY LIMITATION OF THREE MONTHS—EFFECT UPON GENERAL STATUTE.—The special statutory limitation of three months after the rejection of a claim in which to bring action thereupon, is independent of and collateral to the general statute of limitations. It may shorten, but cannot lengthen, the operation of the general statute. After a claim is barred by the general statute of limitations, it can never be allowed or made a valid claim against the estate by any act or neglect of the administrator.

APPEAL—DISMISSAL—NEW TRIAL STATEMENT—OBJECTION NOT APPEARING IN RECORD.—It is not ground for the dismissal of an appeal from a judgment and from an order denying a new trial, that the statement on the motion for the new trial and the amendments thereto were not presented and filed with the clerk in time; and where neither such fact nor objection thereto appears in the settled statement, and they appear only in a separate statement signed by the respondent, which is no part of the record, and has no place

in the transcript, the fact therein stated is not ground for disregarding the settled statement.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Lucien Shaw, Judge.

The facts are stated in the opinion.

M. W. Conkling, for Appellant.

The plaintiff's claim was barred by the general statute of limitations. (Code Civ. Proc., secs. 337, 353; *McMillan v. Hayward*, 94 Cal. 359.) There was no statutory prohibition of action exceeding ten days after presentation of the claim. (Code Civ. Proc., sec. 1396; *Cowgill v. Dinwiddie*, 98 Cal. 486; *Hintrager v. Traut*, 69 Iowa, 746; *Steel v. Steel*, 25 Pa. St. 154.) The signed statement of respondent's attorney, not embodied in the settled statement, is no part of the record upon appeal. (*People v. Bidleman*, 104 Cal. 608; *La Fetra v. Gleason*, 101 Cal. 246; *People v. Fredericks*, 106 Cal. 554.) The presentation of the claim was not the equivalent of an action under a statute like ours. (*Davis v. Hart*, 123 Cal. 384; *Reynolds v. Collins*, 3 Hill, 37; *Bucklin v. Chapin*, 1 Lans. 443.) The early cases in this state intimating an opinion to the contrary were overruled in *McMillan v. Hayward*, *supra*.

E. W. Camp, for Respondent.

Section 353 of the Code of Civil Procedure has no application to claims required to be presented to the administrator. (*Morrow v. Barker*, 119 Cal. 65.) Section 1498, being the special statute applicable to suits on the subject matter of action upon rejected claims, must control upon that particular subject matter. (Pol. Code, sec. 4484.) Presentation of a claim within the time limited for commencing an action stops the running of the statute; and the right to sue only comes from rejection by the administrator. (*Continental Life Ins. Co. v. Barber*, 50 Conn. 567; *Quivey v. Hall*, 19 Cal. 101; *Morrow v. Barker*, *supra*; *Becket v. Selover*, 7 Cal. 215; 68 Am. Dec. 237; *Estate of Schroeder*, 46 Cal. 304; *Willis v. Farley*, 24 Cal. 490, 501; *Boyce v. Foote*, 19 Wis. 199 (215); *Large v. Large*, 29 Wis. 60; *Aiken v. Morse*, 104 Mass. 277.) The claimant has three months after express rejection of the

claim in which to sue thereon. (*Bank of Ukiah v. Shoemaker*, 67 Cal. 148; *Cowgill v. Dinwiddie*, 98 Cal. 481.)

COOPER, C.—Judgment was rendered in the court below upon findings in favor of plaintiff and against defendant as administrator. This appeal is from the judgment and an order denying defendant's motion for a new trial. The facts are not disputed, and, so far as pertinent to the question to be here decided, are substantially as follows: "On the seventeenth day of January, 1893, Mrs. S. C. McLellan made a promise in writing to pay plaintiff on said day the amount in controversy, married the defendant, and died in February, 1896, leaving the amount unpaid. On the twenty-first day of February, 1896, the defendant was appointed administrator of the estate of deceased, and on March 2, 1896, letters of administration were duly issued to him. On June 11, 1896, the plaintiff duly made out and presented his claim in writing to defendant as such administrator. The defendant kept the claim and did not notify the plaintiff of his action upon it until August 16, 1897, when he returned it with his indorsement in writing rejecting it. On the twenty-second day of October, 1897, this action was commenced. The only question to be here determined is whether or not the plaintiff's cause of action was barred by the statute of limitations at the time the action was commenced. It is provided in our code (Code Civ. Proc., sec. 337), that "an action upon any contract, obligation, or liability, founded upon an instrument in writing executed in this state," must be commenced within four years. The action was commenced more than four years and nine months after the written promise was made and due, and the cause of action was therefore barred by the statute unless within the exception of some other section of the code. It is claimed that the case is within the saving clause of the Code of Civil Procedure, section 353, which, so far as applicable here, is as follows: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

The defendant's intestate against whom the action might have been brought died before the expiration of the time limited for the commencement thereof, and the plaintiff, under the provision of the section quoted, had one year after the issuance of letters of administration to the defendant in which to commence his action. He did not commence it within one year after the issuance of letters, but more than one year and seven months elapsed before the commencement thereof. The cause of action is, therefore, not within the saving clause of section 353, and was barred at the time the complaint was filed. In *McMillan v. Hayward*, 94 Cal. 360, it is said: "The statute had, therefore, commenced to run, and would continue to run unless the case is brought within some express exceptions of the statute, and death is not made such, further than that the suitor may in such case commence his action within one year after letters are issued. This action was commenced neither within four years after the maturity of the note, nor within one year after letters were issued. . . . The evident purpose of section 353 is to secure to a party who has a cause of action against a decedent one year after the appointment of a legal representative within which to bring his action. This may or may not have the effect of extending the time."

In this case the time would have expired January 17, 1897, but the statute quoted extended the time to March 2, 1897, thus giving respondent one month and fifteen days more time in which to bring his action than he had under the general statute.

The opinion of the learned judge of the court below is printed by plaintiff's counsel and adopted by him as his brief. In the opinion it is said that the action was stayed by statutory prohibition under section 356 of the Code of Civil Procedure, which provides: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

After discussing the section quoted and sections 1496, 1498, and 1500 of the Code of Civil Procedure, the judge said: "It appears clear, therefore, that the effect of section 1500 and the other sections above quoted is to prohibit the holder of any claim against an estate from beginning any

action thereon until the claim has been presented to the administrator and rejected by him." It appears clear to us that such is not the effect of the sections quoted. Section 1496 expressly says: "If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day." And it has been held by this court that such action can be brought after the tenth day without any formal rejection of the claim. (*Bank of Ukiah v. Shoemaker*, 67 Cal. 148; *Roddan v. Doane*, 92 Cal. 558; *Cowgill v. Dinwiddie*, 98 Cal. 481.) Therefore, plaintiff could have brought this action any time after June 21, 1896, up to March 2, 1897. It was his own laches not to have done so. The theory of the statute of limitations is that a creditor has the full statutory time, whatever that may be, on any day of which he may of his own volition commence an action. (*Hoff v. Funkenstein*, 54 Cal. 235.)

It is said that under the Code of Civil Procedure, section 1498, the plaintiff had three months after the claim was formally and officially rejected by the administrator in which to bring his action. We do not so construe the statute. The section may shorten but cannot be held to lengthen the general statute of limitations. The special limitation of time within which suit must be brought against the estates of deceased persons are called in many states statutes of nonclaim or of short or special limitation. These limitations exist independent of and collateral to the general law of limitations. (2 Woerner's American Law of Administration, sec. 400, and cases cited.)

After the second day of March, 1897, the claim was barred by the statutes of limitations, and thereafter neither the administrator nor the court had the power to allow it. On the contrary, they were expressly prohibited from doing so. (Code Civ. Proc., sec. 1499.) If it could not be allowed because barred by the statute it is difficult to conceive how it could be allowed by a rejection of it and suit brought within three months after the rejection. If it was barred by the statute when rejected, it continued to be barred when suit was brought upon it. Any other construction would enable a claim against an estate to be kept alive for years, or until all

the witnesses were dead, simply by the neglect of the administrator to act upon it. He might forget it, or by accident or negligence mislay it, and the estate be closed and distributed, and yet under the interpretation of the statute claimed by plaintiff suit could be brought upon it and the assets taken from the heirs, though years had passed. If the contention of plaintiff is correct, the administrator by his negligence could add over seven months to the general statutes of limitation. If he could add seven, there is no reason why he could not add seven years, or any other time, in the same manner. The right of a claimant to enforce his claim under our statutes of limitations depends upon his own vigilance and is often lost by his own laches. We know of no principle that will preserve it by the carelessness or laches of the party against whom it is sought to be enforced. If the deceased had lived, and the plaintiff had presented his claim to her and demanded its payment on the eleventh day of June, 1893 (the day of its presentation to the appellant), and she had kept it and never returned it, certainly it would not be claimed that the demand or written claim, so made of her, would prevent her from pleading the statute. Was the demand or written claim made of her administrator after her death of any greater effect? In the one case suit could have been brought without making or presenting any claim; in the other a written claim is made requisite by the statute. It has been many times decided by this court that when a claim is duly presented and allowed by the administrator and the judge that it stops the running of the statute. It has never been held that the mere presentation of it has the same effect. The statute of Illinois required all claims to be exhibited against the estate within two years from the grant of letters or be forever barred. In discussing this statute the supreme court said in the case of *Reitzell v. Miller*, 25 Ill. 69: "It was not the design of the general assembly that the filing of the claim should arrest the general statute of limitations which had previously begun to run, nor to prevent it from afterward running upon a claim not due at the time of its presentation. The object of this section is to facilitate and produce speedy settlement of estates of deceased persons, and it could not have been the design to give creditors an unlimited period

of time within which to establish the justice of their claims after they had been exhibited in the probate court. Such a construction would defeat the manifest intention of the enactment."

The case is cited and approved in *Morse v. Clark*, 10 Colo. 219. In *Toby v. Allen*, 3 Kan. 413, in speaking of a claim where the debtor had died, the court said: "Whether the law shall operate to bar his claim is made to depend entirely upon his own action, subject to the conduct of the debtor as to absence, concealment, payment, etc. Its operation in no event is made to depend upon the action of third persons. No matter who shall commence a suit, or who shall forbear, the operation of the statute depends wholly, subject to the exceptions above referred to, upon the action of the owner of the claim sought to be enforced."

Section 164 of the code of North Carolina is similar to section 353 of our Code of Civil Procedure. The supreme court of that state, in construing the section in *Benson v. Bennett*, 112 N. C. 507, said: "The object in view is that, when the cause of action survives and is not barred at the time of the death, there shall be at least one year after the death of the creditor, or one year after the grant of letters of administration to the personal representative of the debtor, before action is barred. This is conclusively shown by the words of the section, that if the party die before the claim is barred action may be brought after the expiration of the time limited, and within one year."

The law in its wisdom prescribes periods of limitations during which actions must be commenced against persons while living, or they will be barred. The reasons are much greater for requiring diligence in the prosecutions of claims or actions against the estates of deceased persons. It is the everyday experience of almost every lawyer that fictitious or doubtful claims are often presented against estates that never would have been presented against the party living. The claim may have been paid and the only knowledge of such payment possessed by the deceased, whose lips are closed by death. The policy of the law is to settle up the estates of deceased persons as speedily as possible, to pay the just debts and expenses and distribute the property to the rightful

heirs or devisees. For this reason statutes are justified and upheld that shorten the period and time of presenting and bringing suits on claims against estates. The language of the supreme court of the United States in *United States v. Wiley*, 11 Wall. 513, may well be applied to respondent: "Statutes of limitations are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the power to sue; such reasonable time is therefore defined and allowed." In this case, the time was defined and allowed and the respondent had the power to sue. The result may be a hardship, but it is not different from any other case where the party loses through mistake or ignorance of the law. It is of much greater importance that laws should be general and uniform in their operation and enforced by uniform rules, applied alike to all cases, than that a particular hardship should be averted. Plaintiff claims that the appeal should be dismissed because the statement on motion for a new trial and the amendments were not presented and filed with the clerk in time. This is no ground for the dismissal of the appeal. Neither does the case come within the rule of *Wheeler v. Karnes*, 125 Cal. 51, cited by plaintiff. The statement was settled by the judge on the tenth day of March, 1899, and there is nothing in it to show whether or not any objection was made to its settlement in any manner, nor whether any exception was taken. There is a statement printed in the transcript immediately after the settled statement as to certain objections, but it is signed by the attorney for respondent only. This is no part of the record and has no place in the transcript. (*People v. McMahon*, 124 Cal. 435.)

Even if the statement should be disregarded the facts appear from the judgment-roll.

The judgment should be reversed and the cause remanded, with directions to the court below to enter judgment on the findings in favor of appellant and in accordance with the views herein expressed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judg-

ment is reversed and the cause remanded, with directions to the court below to enter judgment on the findings in favor of appellant and in accordance with the views herein expressed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1743. Department Two.—December 14, 1899.]

JEAN PIERRE CAUHAPE, Administrator, etc., Apellant,
v. SECURITY SAVINGS BANK et al., Respondents.

ACTION TO DETERMINE CLAIM TO MONEY—BANK DEPOSIT BY DECEASED PERSON—EVIDENCE—HEARSAY.—In an action to determine a claim of the plaintiff to money deposited in bank by a deceased person, the dividends upon which were made payable to the order of plaintiff, after evidence given of a conversation with the deceased person about the plaintiff, further evidence as to the prior acts and declarations of the father of the deceased person during his last illness is not admissible as being explanatory of how the conversation arose, and such further evidence is properly stricken out as hearsay.

ID.—MONEY HAD AND RECEIVED—EQUITABLE CLAIM TO DEPOSIT—TRUST—JURY TRIAL.—In an action against a savings bank for money had and received to plaintiff's use, and to determine the adverse claim of the executors of a deceased person to the money claimed, the adverse claim cannot be determined by a court of law; and where the bank expressed its willingness to pay the money as the court might determine, and the nature of the issues joined between the disputants and the evidence adduced thereupon showed that plaintiff is asserting an equitable claim to a deposit made by the decedent for her benefit, and is seeking a judgment in satisfaction of a trust, as against the executors, the action against them is in equity, and the plaintiff is not entitled to a jury trial of the issues joined with them.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

A. F. Morrison, Edward J. Pringle, Pringle & Pringle, and Black & Leaming, for Apellant.

Appellant was entitled to the whole explanation of the conversation testified to with Mrs. Floyd. What was repeated to Mrs. Floyd by the witness Bowie and not denied was equivalent to a statement by her. (*Gillam v. Sigman*, 29 Cal. 637; *People v. McCrea*, 32 Cal. 98; *People v. Estrado*, 49 Cal. 171; *Smith v. Whittier*, 95 Cal. 279; Greenleaf on Evidence, 15th ed., sec. 100.) The trust in personal property was provable by parol, and resulted, as matter of law, from the direction of the father of Mrs. Floyd to make a payment to Mary Pond. (Civ. Code, sec. 2221; *Silvey v. Hodgdon*, 52 Cal. 363; *Hellman v. McWilliams*, 70 Cal. 449; *Doran v. Doran*, 99 Cal. 311; *Curdy v. Berton*, 79 Cal. 423; 12 Am. St. Rep. 157; *Williams v. Vreeland*, 32 N. J. Eq. 135; *Williams v. Fitch*, 18 N. Y. 546; 27 Am. & Eng. Ency. of Law, 54, note 4.) Plaintiff was entitled to a jury trial. The enforcement of an equitable right to money does not make the case one in equity, if no equitable remedy is sought. The legal action for money had and received is competent to enforce an equitable right to money. (1 Chitty on Pleading, 16th Am. ed., 362, note 2.) Equitable rights arising under simple contracts are recoverable at law. (*Dutton v. Poole*, 1 Vent. 318, 332; *Dutton v. Poole*, T. Raym. 202; *Martyn v. Hind*, 1 Cowp. 443; *Carnegie v. Waugh*, 2 Dowl. & R. 101, note C. 277; *Phelps v. Prothers*, 16 Com. B. 370; *Scrimshire v. Alderton*, Strange, 1182; *Coppin v. Walker*, 7 Taunt, 237, 241; *Morris v. Cleasby*, 1 Maule & S. 519, 581.)

Oliver P. Evans, and Sidney V. Smith, for Respondents.

The evidence of Bowie stricken out was properly stricken out as heresay. The action was triable by the court and not by jury. (Code Civ. Proc., sec. 592; *McLaughlin v. Del Re*, 64 Cal. 473; *Cassidy v. Sullivan*, 64 Cal. 266; *Wheelock v. Godfrey*, 100 Cal. 578; *Fish v. Benson*, 71 Cal. 434, 435; *Walkerly v. Bacon*, 85 Cal. 137.)

TEMPLE, J.—Plaintiff in his complaint, besides showing the corporate character of the bank defendant and the representative character of the other defendants, simply avers that the bank is indebted to the plaintiff in the sum of three thousand and seventy-nine dollars and twenty cents for money had and received for the use of the plaintiff, for

which due demand has been made, and that the other defendants, as executors of the estate of Cora L. Floyd, deceased, claim and assert some right, title, or interest in or to said money, which claim is without right, and plaintiff asks that such executors be required to set forth the nature of their claims, and that the court adjudge them to be invalid, and that plaintiff is the owner of the money and that she have judgment against the savings bank for the amount. The bank answered, denying its indebtedness, and averred that Cora L. Floyd in her lifetime deposited in the bank three thousand dollars, which the bank still holds, and which is claimed by the other defendants as the property of the estate. The court is asked to determine between the claimants.

The executors answered, denying all the material allegations of the complaint, but aver that their testatrix in her lifetime deposited in the bank three thousand dollars, and at the time instructed the banks as follows:

"Please pay to Mary Pond, or order, the dividends on my term deposit account (for the sum of \$3,000), No. 1356, until further notice.
CORA L. FLOYD."

The deposit was made January 27, 1874, and Mary Pond, afterward Mary Cauhape, brought this action, but upon her death the present plaintiff was substituted. Dividends upon the deposit were paid to plaintiff's intestate until the death of Mrs. Floyd on the twenty-seventh day of February, 1891. The executors claim the deposit as part of the estate of Mrs. Floyd.

It was stipulated for the purposes of the trial that Henry A. Lyons, father of Mrs. Floyd, died testate, and by his will gave Mary Pond two thousand dollars, which was paid, and left the bulk of his estate to Mrs. Floyd. There is no further evidence as to the character or amount of property disposed of by the will of Henry A. Lyons.

Defendants had judgment, and plaintiff on this appeal makes two points: 1. The court erred in striking out certain evidence; and 2. In refusing a jury trial.

The evidence stricken out was part of an answer made by A. J. Bowie, a witness for plaintiff, whose deposition was taken upon commission by questions and answers. Having stated that he was an intimate acquaintance of Mrs. Floyd

and had conversed with her in reference to Mary Pond, he was asked this question: "How did such conversation or conversations begin? Who spoke first, and what was said? State fully and particularly all that was said by both parties, giving the words, if you remember them, if not, the substance of the conversation. A. Can't say who spoke first, but the matter came up in this way: Mr. Friedlander was alone with Judge Lyons one day during his last illness, when he sent for his daughter Cora and told her what his will was, and that he had left Mary Pond certain money in his will (two thousand or two thousand five hundred dollars, I believe) for her faithful services, and he wished Cora to give Mary Pond on his death five thousand dollars; and, turning to Mr. Friedlander, said. 'Now, Friedlander, I want you to be a witness to this.' Mr. Friedlander was one of his executors, and Judge Lyons' intimate friend. So it was, subsequently, in talking over these things with Mrs. Floyd, that incidentally the Mary Pond matter came up. Knowing her character so well, I incidentally asked her if she had paid Mary Pond that money, in accordance with her father's request. She answered," etc.

When the deposition was offered in court defendants' counsel moved to strike out all down to and including the words, "Now, Friedlander, I wish you to be a witness to this," as heresay. The motion was granted, and plaintiff excepted.

Appellant contends that the recital must have been made in that conversation either by witness to Mrs. Floyd, or by Mrs. Floyd to witness, and in either event was relevant. But I cannot so understand the statement. The witness evidently thought the subject needed some explanation to enable the court to understand the conversation, and thereupon proceeded to recite, not what was a part of the conversation, but a circumstance which may have been familiar to him and Mrs. Floyd. He says that subsequently, in talking over these things, incidentally the Mary Pond matter came up, and knowing her so well he incidentally asked her if she had paid the money in accordance with her father's request.

The question could not properly have been said to be incidental, if either had during that conversation recited the

event narrated in answer to the question. The ruling was clearly right.

It is next contended that the court erred in denying to plaintiff a jury trial. So far as the bank is concerned, the complaint is for money had and received. As the complaint did not show that there was in the possession of the bank any special fund or money which could be the subject of controversy, it may be matter of doubt whether it states a cause of action against the executors of Mrs. Floyd. However, the relief asked against the executors is not such as a court of law could give. The bank denied the indebtedness, but admitted that it was possessed of a special deposit made by Mrs. Floyd, which was claimed both by the plaintiff and by the executors of Mrs. Floyd, and asked to have the matter determined, declaring its willingness to pay as the court should determine. This position was acquiesced in by the plaintiff and the other defendants, and there was, therefore, no issue to try with the bank. Plaintiff admits that the legal title to the money was in the estate, but contends that in equity it belonged to plaintiff. The argument is that Mrs. Floyd, by promising her father to pay plaintiff the three thousand dollars, prevented him from changing his will in favor of Mary Pond, and, therefore, the estate received by her from her father is charged in equity with a trust in favor of Mary Pond; and they further contend that when Mrs. Floyd made this deposit, instructing the bank to pay the dividends which should accrue upon it to Mary Pond, she created the fund to which the trust specifically attached.

There is much trouble with this theory as applied to the evidence, which it is not necessary to notice, but it is evident that plaintiff brings suit simply to enforce an equity and not "for money claimed as due upon contract, or as damages for breach thereof, or for injuries." (Code Civ. Proc., sec. 592.) The plaintiff seeks to recover a general money judgment in satisfaction of a trust.

I think, therefore, the relief demanded in the complaint, as against the executors, the issues made by the answer of the executors, the facts disclosed by the evidence, and the issues actually tried, all show that the action is in equity.

In such cases it has been held that the constitution does not

guarantee the right to a jury trial. (*Koppikus v. State Capitol Commrs.*, 16 Cal. 249.) The language of the constitution, it is said, has reference to the right as it existed at common law, and the right which was familiar to the people who adopted the constitution. They desired to secure and render inviolate the right which they understood and had always enjoyed. There is no reason to suppose they intended to extend the right of a jury trial to other cases. The decision cited above was made at an early day, and since that construction was placed upon it the constitution has been many times amended and this provision has always remained unaltered, and, in my opinion, wisely so. The ruling is in accord with the code provision.

The judgment is affirmed.

Henshaw, J., and McFarland, J., concurred.

[L. A. No. 801. Department One.—December 15, 1899.]

SALATHIEL FAST, Respondent, v. WALTER D. STEELE, Executor, etc., et al., Defendants and Respondents, and WILLIAM L. STEELE et al., Defendants and Appellants.

ESTATE OF DECEASED PERSON—MORTGAGE BY EXECUTOR—ORDER FOR MORTGAGE—NOTE.—Under section 1578 of the Code of Civil Procedure, prescribing the proceedings requisite in order to mortgage real property belonging to the estate of a deceased person, a promissory note and mortgage of such property, executed by the executor in pursuance of an order of the court, are not invalidated merely because the order directing the execution of the mortgage omitted to direct the execution of the note.

ID.—DATE OF PAYMENT.—An order made under said section, directing that the mortgage should be made payable "on or before two years" after its date, is complied with by the execution of a note and mortgage which are made payable "on or before one year" after their date.

ID.—ORAL DIRECTIONS OF JUDGE.—An oral direction made by the judge to the executor, at the time of making the order, instructing him to pay or individually secure the interest to become due on the note which was to be secured by the mortgage, does not affect the rights of the mortgagee, if he was without knowledge, or notice of such direction.

APPEAL from a judgment of the Superior Court of Santa Barbara County. W. S. Day, Judge.

The facts are stated in the opinion.

Henley C. Booth, for Appellants.

Grant Jackson, for Plaintiff and Respondent.

W. P. Butcher, for Defendant Walter D. Steele.

HAYNES, C.—This appeal is from a judgment in favor of the plaintiff foreclosing a mortgage executed to him by Walter D. Steele as executor of Mrs. C. L. Steele. The defendants who have taken this appeal are interested in the estate of said testatrix.

The authority to execute said mortgage was not given by the will of the deceased, but it was executed under an order of the court, made for that purpose upon the petition of the executor; and it is contended by appellants "that the executor has not exercised the power to mortgage given him by the court in the manner prescribed by the order from which all his authority was derived."

That order, so far as material here, is as follows: "It is therefore ordered that said executor execute in the name of and for the benefit of said estate a mortgage of all the land and improvements described in said petition to any person, or firm or corporation who will lend said estate the sum of sixteen hundred and fifty-three dollars and seventy-two cents in gold coin of the United States of America, payable on or before two years after the date of said mortgage, with interest not to exceed ten per cent per annum, payable semi-annually."

This order was made June 17, 1896, and two days afterward the plaintiff loaned to the estate said sum, and the executor made and delivered to the plaintiff a promissory note therefor payable "on or before one year after date," with interest payable semi-annually at the rate of ten per cent per annum, and also made and delivered to the plaintiff a mortgage upon the premises described in the order to secure the payment of said note.

It is said "that under said order the executor was authorized to execute a non-negotiable instrument of mortgage

which the mortgagee should have no right to foreclose for two years from its date, and that instead of this he executed a negotiable promissory note payable on or before one year after its date, and a mortgage to secure it."

The proceedings to obtain an order to mortgage real property belonging to the estate of a deceased person are fully specified in section 1578 of the Code of Civil Procedure, which provides that the order, among other things, shall authorize, empower, and direct the executor or administrator "to make such mortgage, and a promissory note or notes to the lender for the amount of the loan to be secured by said mortgage; . . . and may prescribe the maximum rate of interest and period of the loan," Said section further provides that the "jurisdiction of the court to administer the estate shall be effectual to vest such court and judge with jurisdiction to make the order for the note or notes and mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns. No irregularity in the proceedings shall impair or invalidate the same, or the note or notes and mortgage given in pursuance thereof."

The order as made by the court omitted the direction to execute a promissory note. This was an irregularity, but no motion was made to correct it, nor was there any appeal from the order. The executor, however, followed the statute in this respect, and executed a promissory note for the money borrowed. But whether the irregularity consisted in the omission of the court to direct the execution of a promissory note, or in the action of the executor in giving it, appellants have not been injured. It is true that: "A mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect." (Civ. Code, sec. 2928.) As between a mortgagor, acting in his own right, and the mortgagee, by the execution of a promissory note secured by the mortgage, a personal liability is created against the mortgagor to pay any deficiency which may remain after exhausting the mortgage security; but the execution of a note and mortgage by an executor or administrator under an order of court does not create any liability for a deficiency, "ex-

cept in cases where the note or notes and mortgage were given to pay, reduce, extend, or renew a lien or mortgage subsisting on the realty, or some part thereof, at the time of the death of the decedent, and the indebtedness secured by such lien or mortgage was an allowed and approved claim against his estate." The present case does not come within said exception, and therefore the giving of the note creates no liability beyond that which would have been created by the mortgage alone, and appellants are not prejudiced by its execution.

It is further contended by appellants that there was a fatal departure from the authority given by the order, in that the note and mortgage were made payable "on or before one year" after their date, while the order directed that the mortgage should be made payable "on or before two years" after its date.

The code provides that the court "may prescribe the maximum rate of interest and period of the loan," thus leaving it to the discretion of the executor or administrator to make the loan for any shorter period; and in the light of this provision the order should be constructed as fixing the maximum period only. In any event, it would be nothing more than an irregularity which would not "impair or invalidate" the note or mortgage.

It appears from the findings that at the time of making said order the executor was orally directed by the judge of the court to pay or individually secure to the mortgagee the whole of the interest which was to become due on the note which was to be secured by said mortgage, and that the executor, in order to secure to the plaintiff one year's interest, assigned to him his commissions as executor to the extent of one year's interest.

The plaintiff is not bound by this oral direction of the judge to the executor. He is charged with notice of all that the order contains. Whether he would be affected by such oral directions, if it were shown that he had knowledge of them, we need not inquire, since it is neither alleged nor found that plaintiff had any such knowledge or notice. There is nothing in *Thomas v. Parker*, 97 Cal. 456, or in *Stow v. Schiefferly*, 120 Cal. 609, cited by appellants, inconsistent with the views here expressed. *Edwards v. Taliafero*,

34 Mich. 13, was under a different statute which required that the order should "specify the amount to be secured by such mortgage, the rate of interest to be paid, and the length of time for which such mortgage shall be given." Neither the petition nor the order contained any of these particulars.

Griffin v. Johnson, 37 Mich. 87, is directly against appellants. It was there held that the insertion of an attorney's fee, though unauthorized by the license under which the mortgage was made, did not invalidate the mortgage; that it could only support a claim for the reduction of the amount due. It was further held that an administrator's mortgage is not avoided for mere irregularities, and that a proceeding that cannot affect the substantial rights of the parties cannot be worse than irregular.

In *Deery v. Hamilton*, 41 Iowa, 16, the mortgage was executed by the executrix without an order of court, and without authority given by the will. It was held that: "Where money has been borrowed by an executor without authority, and the estate has received the benefit of the same, the creditor may recover the amount loaned with interest thereon at six per cent." None of the numerous cases cited by appellants conflict with our conclusions hereinbefore expressed. We do not doubt that a failure to comply with our statute in essential particulars would invalidate the mortgage; but all that we do decide is that the matters here relied upon by appellants are irregularities only, which do not affect the validity of the mortgage.

I advise that the judgment appealed from be affirmed.

Chipman, C., and Cooper, C. concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Garoutte, J., Van Dyke, J., Harrison, J.

[Crim. No. 549. Department Two.—December 15, 1899.]

THE PEOPLE, Respondent, v. WILLIAM LEWIS, Appellant.

CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES—LARCENY—REVIEW UPON APPEAL.—Where the evidence upon a charge of obtaining money under false pretenses fails of proof thereof, and it is conceded by the attorney general that the evidence indicates that the only offense committed was that of larceny, the judgment of conviction must be reversed; and as the case cannot be tried again upon the charge made, the court will not, upon the appeal, determine moot questions of law.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from orders denying a new trial and denying a motion in arrest of judgment. F. H. Dunne, Judge.

The facts are stated in the opinion of the court.

P. J. Mogan, and J. J. Guilfoyle, for Appellant.

Tirey L. Ford, Attorney General, for Respondent.

THE COURT.—Defendant was charged with and convicted of the crime of obtaining money by false pretenses, and he appeals from the judgment, from the order denying his motion for a new trial, and from an order denying his motion in arrest of judgment. At the oral argument the attorney general stated that he was satisfied that if, under the evidence, the appellant was guilty of any crime, it was that of larceny and not of obtaining money under false pretenses, and thereupon he confessed error. Counsel for appellant, however, contended that there were questions arising out of the evidence, and out of the admissibility of certain evidence, which should be determined here for the benefit of the lower court upon another trial; and thereupon the cause was submitted. Section 1110 of the Penal Code provides that where the false pretense is not evidenced by writing it must be proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. In this case there was no written evidence and the testimony to the false pretenses was that of one witness alone; and appellant contends;

1. That there were no such corroborating circumstances as the law contemplates; and 2. That the court erroneously admitted certain evidence touching the matter of corroboration; and these are the questions which he asks to have determined. But upon further consideration of the case it is evident that it will not be tried again upon the present charge, and that therefore these are merely moot questions not calling for determination.

Upon the confession of error of the attorney general the judgment and orders appealed from are reversed.

[Sac. No. 590. Department One.—December 18, 1899.]

BANK OF ORLAND, Respondent, v. T. H. DODSON, et al.,
Appellants.

SUMMONS—SERVICE—PROOF—JURISDICTION—JUDGMENT BY DEFAULT.—

The service in fact of the summons, rather than the proof of service, gives the court jurisdiction of the person of the defendant. If the summons was served, and the return of service purports upon its face to have been made by proper authority, even though not in fact so made, the court has jurisdiction to hear and determine the cause, and may render a valid judgment therein by default.

Id.—UNAUTHORIZED RETURN OF SERVICE—FORECLOSURE OF MORTGAGE—

VALID DECREE AND SALE.—The fact that the name of the sheriff was signed to the return of service of the summons in an action to foreclose a mortgage, by one assuming to act as deputy who was not an authorized deputy, cannot affect the jurisdiction of the court, by virtue of the service actually made, to render a valid decree of foreclosure, or affect the validity of the sale under the decree.

Id.—ALIAS SUMMONS—VOID PROCEEDINGS—DISMISSAL.—

After the plaintiff has obtained title under a valid foreclosure of a mortgage, and the judgment has been fully satisfied and the deficiency judgment paid, and the time for appeal therefrom has expired, there is no authority for the issuance and service of an alias summons in the cause, and the court has no jurisdiction to proceed with the trial thereof. All the proceedings had under such alias summons are void, and any judgment rendered thereunder will be reversed upon appeal, and the proceedings dismissed.

APPEAL from a judgment of the Superior Court of Glenn County and from an order denying a new trial. Frank Moody, Judge.

The facts are stated in the opinion.

Charles L. Donohoe, and Seth Millington, for Appellants.

The apparent return of service of summons, even though false in fact, justifies the court in acting upon it. (*Peck v. Strauss*, 33 Cal. 686.) The fact of service gave the court jurisdiction of the person. (*Pico v. Sunol*, 6 Cal. 295; *In re Newman*, 75 Cal. 220; 7 Am. St. Rep. 146; *Herman v. Santee*, 103 Cal. 519; 42 Am. St. Rep. 145.)

Ben F. Geis, for Respondent.

The summons purports to have been served by the sheriff in his official capacity, and it cannot be presumed against the record that the one who signed as deputy sheriff acted in any other capacity. Not being a deputy in fact, he had no power to act. (Pol. Code, sec. 4113; *Maddux v. Brown*, 91 Cal. 523; *Warren v. Ferguson*, 108 Cal. 536; *Rauer v. Lowe*, 107 Cal. 233; 48 Am. St. Rep. 140.) The facts show a want of jurisdiction of the person of the defendants and that the judgment was absolutely void. (*Pioneer Land Co. v. Maddox*, 109 Cal. 642; 50 Am. St. Rep. 67; *Hill v. City Cab etc. Co.*, 79 Cal. 191; *Hahn v. Kelly*, 34 Cal. 402; 94 Am. Dec. 472; *Joyce v. Joyce*, 5 Cal. 449.) There was no valid proof of service sufficient to justify the judgment by default. (*Reinhart v. Lugo*, 86 Cal. 395; *Maynard v. MacCrellish*, 57 Cal. 355; *Howard v. Galloway*, 60 Cal. 10; *Weil v. Bent*, 60 Cal. 603; *Barney v. Vigoureux*, 75 Cal. 377.)

CHIPMAN, C.—Foreclosure. Plaintiff remarks in its brief: "The case is indeed a peculiar one, and none just like it is found in the books." The statement is probably correct. The undisputed facts are that plaintiff brought the action in due time to foreclose a mortgage given by defendants. Summons duly issued April 17, 1896, and was served and returned on April 18, 1896, the return being signed "H. C. Stanton, Sheriff, by C. H. Merrill, Deputy Sheriff." An indorsement made thereon by the clerk shows

the service to have been regularly made upon the defendants, and that, the time for answer having expired, their default was duly entered. On May 13, 1896, the court entered its decree containing the usual recitals and showing, among other facts, that summons were served upon defendants, and that "the time to appear and demur or answer the complaint having expired, and no appearance having been made by either of the said defendants, . . . the default of said defendants . . . was duly given and made and regularly entered." The decree then recites that the cause came on to be heard, and evidence, both oral and documentary, was introduced, from which it appeared that all the allegations of the complaint are true, etc. Wherefore the court found the amount due on the promissory note mentioned in the complaint, to wit, two thousand seven hundred and forty-three dollars and fifty-five cents, and decreed the same to be a lien upon the described premises; ordered the sale thereof and appointed a commissioner to conduct the sale, and also made the usual directions as to a deficiency judgment. The commissioner was duly appointed; he qualified, and on June 10, 1896, he made the sale in due form and upon due notice, and made return thereof, from which it appears that plaintiff became the purchaser for the sum of two thousand seven hundred dollars, and received a certificate of sale. In his return the commissioner shows that he deducted certain expenses from said amount, leaving two thousand six hundred and eighty dollars, and paid the same to plaintiff and took its receipt therefor, which was credited upon the judgment leaving a deficiency of sixty-three dollars and fifty-five cents, for which judgment was entered July 9, 1896, and was by defendants fully paid August 10, 1896. The period for redemption having expired, the commissioner, on January 14, 1897, made and delivered his deed of the premises in due form to plaintiff, which was duly acknowledged and recorded January 15, 1897. Apparently, plaintiff became distrustful of the validity of its judgment, because, as it turned out, Merrill was not, at the time he served the summons, in fact a deputy sheriff; and, acting on this assumption, plaintiff caused the sheriff to make an affidavit to the effect that Merrill was not a duly and regularly appointed deputy

sheriff when he served the summons. Whereupon plaintiff, on April 12, 1897, filed this affidavit with the clerk, obtained an alias summons, and caused it to be served upon defendants. Defendants appeared by demurrer, which was overruled, and they thereupon answered and, among other things, averred the facts as to the former trial of the cause, the judgment therein, and that it has not been set aside or modified; set forth the sale pursuant to the decree and the purchase by plaintiff, the entry of the deficiency judgment and its payment in full satisfaction of all claims against defendants, and prayed for a dismissal of the action.

In this state of the matter and against defendants' objections the court proceeded to hear and determine the case upon the original complaint as it was amended at the first trial, and to try the cause precisely as thought it had not been already once tried. The court and counsel for plaintiff acted upon the theory that all the previous proceedings were void and could be treated as though they had no existence whatever.

We think plaintiff entirely misconceived the powers of the court in the premises. It is conceded, and the fact was, that defendants were served with summons. The court had jurisdiction by virtue of this service, for the record shows on its face that the service was made by one having authority, and the court, therefore, could hear and determine the cause; until set aside by some proceeding known to the law, its judgment was valid, and it follows that the sale in pursuance thereof was valid. (*Herman v. Santee*, 103 Cal. 519; 42 Am. St. Rep. 145; Freeman on Judgments, sec. 126.) It is the fact of service rather than the proof of service that gives jurisdiction. (*In re Newman*, 75 Cal. 220; 7 Am. St. Rep. 146.)

Defendants, as we have seen, were in fact served with summons; they did not appear nor in any way call in question the regularity of the service; they took no steps to have the judgment set aside, but permitted their property to be sold, without objection, pursuant to the judgment entered in the action, and they paid the deficiency judgment; they did not appeal from the judgment, and the time for appeal had expired when the alias summons was issued. Under the cir-

cumstances disclosed the defendants could not attack the judgment, and, so far as we know, never threatened to do so, nor did they in any way attempt to prevent the plaintiff from enjoying its fruits. The plaintiff had all the relief under that judgment to which it was entitled under any judgment. The court had no authority to enter upon a second trial of the cause, and its proceedings therein were, therefore, unavailing for any purpose and wholly unauthorized. After the court had entered its judgment it had no jurisdiction to again try the case until that judgment was set aside; and when the alias summons was issued the action was no longer pending, for judgment had been entered, the time for appeal had elapsed, and the judgment had been satisfied. The court was without jurisdiction and its judgment at the second trial was void. (Freeman on Judgments, sec. 127.)

It is advised that the judgment and order be reversed and the proceeding dismissed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and the proceeding dismissed.

Garoutte, J., Van Dyke, J., Harrison, J.

[Crim. No. 533. Department One.—December 19, 1899.]

THE PEOPLE, Respondent, v. ELSIE WILLIAMS et al.,
Appellants.

CRIMINAL LAW—EXTORTION—CONTROLLING CAUSE—CONSTRUCTION OF CODE.—Section 518 of the Penal Code, defining the crime of extortion, and providing that "the crime is only committed when the property is obtained with the consent of the owner, and this consent must be induced by an unlawful use of force or fear," can only mean that the unlawful use of force or fear must be the operating or controlling cause which produces the consent.

ID.—ERRONEOUS INSTRUCTIONS—FEAR AS A PARTIAL CAUSE—PREJUDICIAL ERROR.—Instructions to the effect that the crime was committed if the fear of the prosecuting witness, induced by the threats of the defendants, entered to any extent whatever into the parting by him with his money are erroneous; and, where the evidence is such as specially called for correct instructions upon the subject of

controlling cause, the error in giving such incorrect instructions is prejudicial, and is not cured or neutralized by other correct instructions as to the elements constituting the crime of extortion.

1D.—EVIDENCE—DECLARATION OF CODEFENDANT AS TO OTHER PROPOSED OFFENSES.—The declaration of a codefendant as to other proposed offenses, entirely distinct from the offense in controversy, is inadmissible; and the refusal of the court to strike it out is prejudicial error.

1D.—UNEXPECTED ANSWER—OBJECTION TO QUESTION—MOTION TO STRIKE OUT.—When an unexpected answer of a witness, which could not be anticipated by objection to the question, contains inadmissible and prejudicial matter, a motion to strike it out is the proper remedy. When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to the strike out comes too late, unless preceded by an objection to the question, but the rule is otherwise when the answer may or may not be admissible.

1D.—IMMORAL CONDUCT OF DEFENDANTS.—Evidence of the immoral conduct of the defendants as between themselves prior to the commission of the crime charged in no way tends to indicate the commission of the crime alleged, and is inadmissible.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

Robert Ferral, for Appellant Elsie Williams.

Evans & Meredith, Dorn & Dorn, and Theodore Savage for Appellant Myron H. Azhderian.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

GAROUTTE, J.—Defendant Elsie Williams and one Azhderian were jointly charged, tried, and convicted of the crime of extortion. The gist of the charge is that said defendants did extort from W. A. Nevilles two thousand dollars through fear upon his part induced by threats of defendants that they would publicly accuse him of adultery with defendant Williams.

The defendants asked the court to give the jury the following instruction: "If the money was given to Mrs. Williams by reason of love or affection, or by reason of the past relations existing between the said Mrs. Williams and the said

Nevilles, or in settlement or compromise in whole or in part of a suit either begun or threatened, then I charge you that such payment is not extortion, and the defendants must be acquitted." This instruction was given as asked, but the following addition was made thereto by the court: "But, if the threat and fear mentioned in the indictment formed any part of the inducement to any such transfer of money, then the receipt of it would constitute the crime of extortion, and the person who received it, as well as any others who were concerned in the commission of such crime, . . . would be guilty of the crime charged." After the jurors had retired to deliberate upon their verdict they returned to the court for further information, whereupon the court, among other matters, stated to them as follows: "The fear that the threat would be carried out, if there was a threat, must have become a part at least of the reason for the payment of the money. It may be that there would be half a dozen reasons for a man to pay out money, which there would be no crime in receiving at all, but if a threat had been made such as charged in the indictment, and fear that such threat would be carried out forms a part of the reason for the payment of the money, then the crime of extortion would be accomplished."

The foregoing instructions do not correctly present the law of extortion. The conditions therein existing may have been disclosed by the evidence, and still the defendant be not guilty. Measured by these instructions, if the fear of the prosecuting witness induced by the threats of defendants entered to any extent whatever into the parting by him with his money, then the crime of extortion was committed. This cannot be a sound declaration of law. If the fear working upon the mind of the prosecuting witness by reason of these threats formed but the slightest part of the operating cause which induced Neville to part with his money, then no extortion was committed. If affection or sympathy upon the part of Neville for this defendant was the principal reason which induced him to part with his money, then there was no crime. In other words, our statute, section 518 of the Penal Code, defining extortion, says: "The crime is only committed when the property is obtained with the consent of

the owner, and this consent must be induced by an unlawful use of force or fear." The statute can only mean that the unlawful use of force or fear must be the operating or controlling cause which produces the consent. If some other cause were the primary and controlling one in inducing the consent, then there would be no extortion.

In another form we find this principle stated in *People v. Haynes*, 11 Wend. 567, a case of obtaining property under false pretenses. It is there decided: "The position that the falsehood had a material effect upon the person defrauded in procuring the property necessarily implies that without it the object of the felon would have failed; he could not have obtained it; at least, we are disposed to require the false pretense or pretenses to be so material that without the existence of their influence upon the mind of the person defrauded he would not have parted with the property." Tested in the measure furnished by this decision these instructions fail. The fear induced by the threat may have formed a part of the reason for the payment of the money, and yet the defendant be not guilty, for such a fear does not necessarily exclude the idea that the prosecuting witness would have parted with the money in the absence of that fear. This "part of the reason" must be so material that the money would not have been paid without it. And when so material it is the moving or operative cause which produces the consent to part with the money. It is plain the instructions quoted fail to cover this ground. While the court repeatedly charged the jury correctly as to the various elements constituting the crime of extortion, these instructions in no degree neutralize the error committed in the giving of the instructions quoted. It is impossible for this court to say that the verdict of the jury was based upon the sound, rather than the unsound.

In view of the somewhat peculiar facts of this case it was all important that the instructions to the jury bearing upon the reasons which induced the prosecuting witness to part with his two thousand dollars should be squarely within the law. Some of these facts are to the effect that within a day or two after the alleged commission of this extortion the prosecuting witness parted freely and voluntarily with an additional five hundred dollars to this defendant. And, indeed, the social

relations existing between these two people for some time after the commission of this alleged offense seem to have been of a very friendly character.

A witness was interrogated as to a certain conversation he had with the codefendant, Azhderian, prior to the alleged extortion. He testified that in answer to the question, "What are you building the house out there for?" the codefendant, Azhderian, in substance stated: "The ladies [meaning the defendant and another woman] are dead fly, and I am building this house so that when we leave the Paragon [Neville's farm] we can go there. Then I will bring business men out there and we will get them full of wine and afterward blackmail them." A motion to strike out this statement of the witness was denied. The statement should have been stricken out. It has nothing whatever to do with the merits of this prosecution. It was greatly prejudicial to the defendant, for it was well calculated to make the jury look upon her with unkindly eyes. A contemplated scheme by these two defendants to blackmail or extort money from other persons was no more admissible at this trial than the evidence of previous robberies or arsons would have been admissible if defendants had been upon trial for robbery or arson. It is now urged that the motion to strike out was properly denied as coming too late, no objection having been first made to the question. This position cannot be sustained. No objection perceptible to this court could have been well made. It was not until the answer came that it could be ascertained the evidence should not go to the jury. And then the only remedy was the motion to strike out. Many statements made by the codefendant would have been clearly admissible. And the admissibility of this evidence could not be determined until it was first ascertained what it was. When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late unless preceded by an objection to the question, but the rule is otherwise when the evidence may or may not be admissible.

Defendant now asserts that the trial court permitted other errors in the admission of evidence. Many of these claims are without substantial foundation, while the lack of objections or exceptions forbid the consideration of others. Upon a sec-

ond trial of the defendant many of these matters will not arise. It may be suggested that evidence tending to show these defendants to have been guilty of immoral conduct between themselves prior to the alleged commission of this crime should not be admitted. Such character of evidence in no way tends to indicate the commission of the crime with which they are charged.

For the foregoing reasons the judgment and order are reversed and the cause remanded.

Harrison, J., and Van Dyke, J., concurred.

[Sac. No. 586. Department One.—December 19, 1899.]

COUNTY OF SACRAMENTO, Respondent, v. SOUTHERN PACIFIC COMPANY et al., Appellants.

ACTION FOR MONEY HAD AND RECEIVED—EQUITY AND GOOD CONSCIENCE.

—An action for money had and received is based upon the principle that one party has money which in equity and good conscience belongs to another; and, where the defendant has no money which belongs in equity and good conscience to the plaintiff, the action cannot be maintained.

ID.—ACTION BY COUNTY—MONEY PAID FOR BRIDGE—GOOD FAITH—INVALID CONTRACT.—An action cannot be maintained by a county to recover back money paid under a contract entered into in good faith and in accordance with the advice of its law officer, for the construction of a railroad bridge across a river separating it from another county, with a separate overhead roadway, to be kept in order by the railroad company for free public highway purposes, the construction of which was completed and enjoyed by the public, notwithstanding the contract may be invalid, for want of compliance with the requirements of the law.

ID.—EQUITABLE ESTOPPEL OF COUNTY—BENEFIT UNDER EQUITABLE CONTRACT LEGALLY DEFECTIVE.—A county, state, or municipality may be equitably estopped by its acts, in the same manner as an individual, when acting within the general scope of its powers. A county paying money for a bridge to be used for highway purposes, which has been completed, and of which the county enjoys the benefit, is estopped to maintain an action to recover the money, if the contract under which it was paid, though legally defective, was not immoral, inequitable, or unjust.

ID.—CONSTRUCTION OF COUNTY GOVERNMENT ACT—RECOVERY OF MONEY ILLEGALLY PAID—EQUITABLE ESTOPPEL—GENERAL POWERS OF SUPERVISORS.—Section 8 of the County Government Act, providing for the recovery of money paid by order of the supervisors “without authority of law,” only applies to payments which the board has no general power to make, and does not affect the principle of equitable estoppel as applied to payments made within the scope of the general powers of the board, and by virtue of which it has acquired a benefit, or an interest, of which it retains the enjoyment.

ID.—GENERAL POWER OVER BRIDGES.—A board of supervisors has general power to construct, buy, or rent a bridge, or to purchase an exclusive right of way over a bridge, and may be equitably estopped to recover back money paid therefor, which has secured to it a benefit, though the forms of law were not complied with in making the contract under which it was paid.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. John Hunt, Judge, presiding.

The facts are stated in the opinion of the court.

A. L. Hart, for Appellants.

The contract was within the general and permanent powers of the board of supervisors. (Pol. Code, sec. 2643, subd. 5, secs. 2713, 4001; County Government Act of 1891, sec. 25, subd. 4; Stats. 1891, p. 106.) Section 8 of the County Government Act only applies when the board has no jurisdiction to act. The board is estopped from repudiating and recovering back the payment made in good faith under which it has secured and enjoyed a benefit, which it had general power to acquire. (5 Thompson on Corporations, secs. 5975, 5978; *Hitchcock v. Galveston*, 96 U. S. 356; *Argenti v. San Francisco*, 16 Cal. 266; *Brown v. Atchison*, 39 Kan. 37; 7 Am. St. Rep. 515; *Curnen v. Mayor*, 79 N. Y. 511; *East St. Louis v. East St. Louis Gas-Light etc. Co.*, 98 Ill. 415; 38 Am. Rep. 97, 102; *Hutchinson etc. Ry. Co. v. Fox*, 48 Kan. 70; 30 Am. St. Rep. 273; *Knox Co. v. Aspinwall*, 21 How. 544; *Hannibal etc. R. R. Co. v. Marion Co.*, 36 Mo. 294; *Houfe v. Fulton*, 34 Wis. 608; 17 Am. Rep. 463; *Pine Grove v. Talcott*, 19 Wall. 678; *Memphis etc. R. R. Co. v. Dow*, 19 Fed. Rep. 388-98; *Thompson v. Lambert*, 44 Iowa, 239-48; *Kneeland v. Gilman*, 24 Wis. 39; *Chapman v. Douglas Co.*, 107

U. S. 348-55; *Ward v. Forrest Grove*, 20 Or. 355; 2 Herman on Estoppel, sec. 1021.)

Frank D. Ryan, District Attorney, and J. Charles Jones, for Respondent.

The contract, not having been made in the statutory mode, is not binding on the county. (*Murphy v. Napa Co.*, 20 Cal. 497; *Linden v. Case*, 46 Cal. 172; *Glass v. Ashbury*, 49 Cal. 571; *Ertle v. Leary*, 114 Cal. 238; *Winn v. Shaw*, 87 Cal. 631.) The contract being void and illegal, the doctrine of estoppel cannot be invoked. (*Sutro v. Pettit*, 74 Cal. 336; 5 Am. St. Rep. 442; *County of Modoc v. Spencer*, 103 Cal. 502; *McFarland v. McCowen*, 98 Cal. 331.)

GAROUTTE, J.—This is an action to recover fifteen thousand dollars, and twenty per cent in addition thereto as damages, from the aforesaid defendants. Judgment was rendered for the amount claimed, and an appeal is now taken from that judgment and from the order denying a motion for a new trial.

The facts in substance are these: The California Pacific Railroad Company contemplated building a railroad bridge across the Sacramento river at Sacramento city, connecting the counties of Sacramento and Yolo. The construction of this bridge would result in the demolition of the old railroad bridge between the two counties, which also was used by the public for travel in vehicles, on foot, etc., and would necessarily prevent travel from one county to the other. The board of supervisors of Sacramento county, hearing of the contemplated improvement, entered into negotiations with the California Pacific Railroad Company, whereby it was agreed that the county should pay to it fifteen thousand dollars upon December —, 1893, and fifteen thousand dollars upon the completion of the structure. In consideration of the aforesaid agreement upon the part of the county, said railroad company promised "to construct and maintain in connection with said new railroad bridge an overhead or separate roadway, to be maintained by the California Pacific Railroad Company for free public highway purposes, and to be independent of either tracks or trains." The company further agreed, in consideration of the aid extended in the form of this thirty thousand dollars, to prosecute the work

with diligence and finish the construction before December 31, 1895. It was also stipulated that if the work was not completed by the aforesaid time the company was to receive nothing from Sacramento county, and also refund the payment already made. At this stage of the proceedings the district attorney of plaintiff advised the board of supervisors that it had the power to enter into such a contract with defendants, and further advised the board that the respective action taken at that time by the county and the railroad company, in the form of written offers by the company and resolutions passed by the board, amounted in law to a legal, valid contract between the parties. Thereafter the first payment of fifteen thousand dollars was made to the company, and the work of construction begun. In October, 1895, the county of Sacramento, upon the claim that it had never entered into a valid, binding contract with defendants to pay the aforesaid thirty thousand dollars, brought this action to recover the sum of fifteen thousand dollars already paid, with twenty per cent additional as damages in the form of a penalty, the basis of this claim being that the money was paid without authority of law and could be recovered at the suit of the district attorney of the county. The contract is claimed to be void by reason of the fact that it was entered into contrary to the statutes, which call for plans and specifications, notices, bidding, etc., as conditions precedent to the building of a bridge by the county. The bridge was completed in December, 1895.

Among other defenses relied upon an estoppel is set out, and upon this question of estoppel the court made the following finding of fact: "It is true that said overhead roadway upon said new bridge was fully constructed and opened to the public on the sixteenth day of December, 1895, and that ever since that time the same has been used by the inhabitants of Sacramento and Yolo counties for travel to and fro between said counties, with immunity from contact with their trains or tracks; and that said public has had the exclusive use of said overhead roadway without toll or charge; and that no railroad track has been laid thereon. And that said overhead roadway has been constructed and maintained in a good and substantial manner."

This is, in substance, an action to recover money had and received, and this character of action is based upon the principle that one party has money which in equity and good conscience belongs to another. In the face of the facts quoted we are at a loss to see how this money in equity and good conscience belongs to Sacramento county. If the plaintiff had lived up to its contract to the letter and paid the entire sum of thirty thousand dollars to defendants, and if at some future time defendants had closed this overhead roadway, we can readily imagine that the county of Sacramento would have at once asked and obtained relief from the courts, any question of *ultra vires* contract or defective contract to the contrary. Certainly, under such circumstances the county would be entitled to relief, for defendant would not be in a position to raise any question as to the invalidity of the contract under which the money was paid to it. With the money in hand they would be absolutely estopped upon every principle of common justice from casting a single speck upon the binding force of the contract which had been entered into with the county, and upon which it had received the money. The rule works equally well the other way, and we are satisfied that this plaintiff is estopped from securing a return of the money. There is no claim that the county was defrauded. There is no claim that the benefits accruing to the county were not equal to the expenditure made. By this transaction the county has secured an exclusive right of way over the bridge of defendants as long as that bridge remains. It may be said that the easement of right of way over the bridge, with the annexed covenant to keep in repair, is far more valuable than a perfect title to the bridge itself. For the public have all the benefits of the bridge without any of the burdens accompanying its ownership.

Many legal complications arise in the building of a bridge across a stream forming the boundary line between two counties neither county is able to deal with the question alone; it appears that the consent of both is required; it is extremely doubtful of the statutes bearing upon the course to be followed by boards of supervisors in building bridges within the county are applicable to the building of bridges over streams dividing two counties; legislation upon the

question is lacking, and, what little there is, most indefinite. Possibly in this case the law was not carried out. Possibly, the defendants, aside from any question of estoppel or ratification, could not have recovered either installment of the thirty thousand dollars to be paid. But still the all-important fact remains that these parties entered into the contract in the utmost good faith. The advice of the law officer of the county was taken, and he advised that the contract was a lawful one and was sufficiently evidenced; the work contracted for was done; the money was paid for the work; the party paying the money received full value for it, and still enjoys the benefits received from the contract. Under such circumstances a plain example of estoppel is before us, and by reason of that estoppel the plaintiff is forever barred from recovering the money involved in this litigation. If a municipality purchase a fire-engine, and possession is taken and purchase price paid, in an action by the municipality to recover the amount paid, by reason of invalidity in the contract, we imagine no court would grant the relief—at least while the municipality retained possession of the engine. And this, too, notwithstanding the widest departure from the statute may have been practiced in the making of the contract. The case at bar in principle differs but little from the illustration given.

There is nothing so sacred about a municipality that an estoppel may not be raised against it by its acts. In equity and good conscience, like individuals, it is bound to treat its neighbors fairly and justly. In *Los Angeles v. Cohn*, 101 Cal. 373, this court, in order to do justice, held that the acts of the city were such as to estop the public from questioning the title of the defendants in that action to a strip of land claimed by the city to be a portion of a public street. The question of estoppel between a county and an individual involves no such grave difficulties. The doctrine of estoppel against municipalities is universally applied. It is said in Bigelow on Estoppel, section 1128: "But it is a well-settled principle, applicable alike to states or the United States, that whenever a government descends from the plane of sovereignty and contracts with parties, such government is regarded as a private person itself and is bound accordingly. . . . A state in its contracts with individuals must be judged

and must abide by the same rules which govern similar cases between individuals; and, whenever such a contract comes before the courts, the rights and obligations of the contracting parties will be adjudged upon the same principles as if both contracting parties were private persons." It thus appears that there is no substantial difference in the application of the doctrine as between private and public corporations. Indeed, the whole history of estoppel, as involved in this case, is strongly and convincingly stated in *Brown v. Atchison*, 39 Kan. 37, in the following language: "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void in whole or in part because of want of power on the part of the corporation to make it, or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity toward the other party, by either rescinding the contract and placing the other party in *statu quo*, or by accounting to the other party for all of the benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit." In the case of *Commissioners of Knox County v. Aspinwall*, 21 How. 544, it is said: "Citation of authorities to this point is unnecessary, as the whole subject has been recently examined by this court, and the rule clearly laid down that a corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with other parties, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced." From these authorities, and many others which might be cited, it is apparent that public corporations, like individuals, are bound to act in good faith and deal justly; that they cannot be allowed to enter into

contracts involving others in expensive engagements, silently permit these contracts to be executed, and then repudiate them because the statutory steps have not been pursued in the letting of the contracts.

This action is largely based upon authority claimed to be found in section 8 of the County Government Act, wherein it is provided: "Hereafter, whenever any board of supervisors shall, without authority of law, order any money paid as a salary, fees, or for other purpose, and such money shall have been actually paid the district attorney of such county is hereby empowered, and it is hereby made his duty, to institute suit in the name of the county against such person or persons to recover the money so paid, and twenty per cent damages for the use thereof." This statute was never intended to have the effect, and cannot now be construed as having the effect, of nullifying the principle of law we have been considering, known as an equitable estoppel. Money paid "without authority of law" means money paid out by the board of supervisors upon claims based upon a subject matter not within the scope of the powers of the board. In other words, it is the application of the moneys of the county to a purpose not within the general powers of the board. But the power of a board of supervisors to construct bridges, to build and lay out roads, to secure easements in the form of rights of way for public travel, are matters within the jurisdiction of the board of supervisors. Again, by subdivision 8 of section 25 of the County Government Act, the board has the power to purchase or lease real or personal property necessary for the use of the county. The county could buy a bridge or lease a bridge. As already suggested, in substance this transaction was a purchase of this overhead roadway. The county is the owner of everything pertaining to the bridge that is valuable, with the single exception of the old lumber and iron when decay overtakes it. If a county may buy a bridge, or rent a bridge, it may purchase the exclusive right of way over a bridge. We need not split hairs in giving a technical name to the interest which the county has in the bridge, but it is apparent to everyone that it has a substantial interest therein, and, in the absence of some claim or showing to the contrary, we may assume that such interest is full value for the money

expended. We are not now passing on the validity of the contract entered into between the parties to this litigation. It is not material here. We are not intimating but that at the instance of a taxpayer in the early history of these negotiations the entire transaction may not have been judicially killed. All that we have said bears upon the single question of estoppel, and is said in view of the conclusion arrived at by the court that an equitable estoppel against plaintiff should be held in this case.

For the foregoing reasons the judgment and order are reversed, and the cause remanded.

Van Dyke, J., and Harrison, J., concurred.

A rehearing in Bank was denied, January 19, 1900, upon which the following dissenting opinion was rendered:

BEATTY, C. J.—I dissent from the order denying a rehearing of this case because, in my opinion, the decision rests necessarily upon a doctrine destructive of essential safeguards of important public rights. The essence of the decision is that a contract, void for want of compliance with the conditions and limitations upon and under which alone boards of supervisors have power to bind their counties, acquires all the force and obligation of a valid contract if the contractor commences work and expends money in pursuance of its terms before he is notified that the county repudiates it. This doctrine sweeps away at once all limitations upon the power of the board, for it can readily be seen that the contractor must always have it in his power to commence work just as soon as he has induced the board to enter into a contract in defiance of the regulations intended to govern their action; and it is also apparent that the board which desires to make contracts in disregard of the law will have the same motive to allow the commencement of work that they have to enter into the illegal contract.

And how can the equitable doctrine of estoppel apply in such a case against the public? The facts are all known to the contractor. There has been no misrepresentation, no concealment. He knows what the contract is and how it has been obtained. If it is illegal and void he knows it, and if

he goes to work under it he does so with his eyes open. In such case there can be no estoppel.

The expression quoted in the Department opinion from *Argenti v. San Francisco*, 16 Cal. 266, was never the law even of that case. It was but the opinion of a single judge, not concurred in by his associates and expressly repudiated by him in the later case of *Zottman v. San Francisco*, 20 Cal. 109, 81 Am. Dec. 96, where he lays down the doctrine which this case sets aside. It is true that some decisions have been made in other jurisdictions which sustain the present ruling here, but it is certainly opposed to the views which have heretofore prevailed in this court, and to the weight of authority elsewhere.

The judgment of the superior court should have been affirmed.

[L. A. No. 802. Department Two.—December 19, 1899.]

In the Matter of the Estate of STEPHEN SILVANY, Deceased.

WILL—SUBSCRIPTION—EVIDENCE.—The verdict by the jury, finding that the will in question was never subscribed by the alleged testator, held justified by the evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. W. H. Clark, Judge.

The facts are stated in the opinion of the court.

W. A. Harris, Harris & Garrett, and Augustus A. Montano, for Appellants.

Z. Montgomery, and J. W. MacDonald, for Respondents.

TEMPLE, J.—Stephen Silvany died January 10, 1898, and on the 28th of January, 1898, the superior court of Los Angeles county admitted to probate what purported to be his last will, being dated January 8, 1898. It was probated upon the petition of Francisco Quijada. The petitioner and his illegitimate son, Jesus Quijada, were the sole beneficiaries

under the will, and one L. C. Flores was named therein as the executor.

Within one year thereafter, but precisely when does not appear, certain parties inaugurated a contest in the superior court by filing a petition alleging that the decedent left a will dated March 6, 1891, in which certain of the petitioners were named as executors. In that will all the property of the testator, except five hundred dollars, was left to Francis Mora in trust for the erection and maintenance at Los Angeles of a Catholic female orphan asylum. In that petition the probate of the other will was averred, but it was charged that it was, in fact, never published or executed by Silvany, but was fraudulently concocted in pursuance and furtherance of a scheme to defraud the estate of Silvany out of all the property owned by Silvany. It was also charged that at the time of the alleged making and publishing of said will of 1898 the testator was of unsound mind and subject to undue influence from said Francisco Quijada.

An answer was interposed to the petition and a contest had. The due execution of the will of 1891 was not really disputed. As to the will of 1898 several special issues were submitted to the jury, to only one of which response was made. That was as follows: "Did the deceased, Stephen Silvany, subscribe the contested will himself? A. No."

Upon this verdict the court made an order setting aside the probate of the will of 1898, and revoked the letters issued to Flores, and admitted to probate the will of 1891.

The appellant makes here but the single point that the evidence does not justify the verdict. The proposition is urged with great force and earnestness, and we have carefully read and considered the evidence in connection with the argument. We cannot say that there was not sufficient evidence to justify the verdict.

It is not a case where admittedly a will was made which the alleged testator intended to make, but which, it is charged, he was induced to make through fraud or undue influence. The verdict is to the effect that Silvany did not make the will at all. It must also be borne in mind that it is within the province of the jury to determine the credibility of the witnesses. The jury doubtless believed the testimony of Juan B. Sanchez and Gonzales, notwithstanding the as-

saults made upon their credibility, and disbelieved the counter-statements of Quijada and others. This court will not ordinarily review the conclusion of the jury upon that subject. Upon that basis there certainly were reasons to doubt the honesty and fairness of Quijada and Flores in the matter. Quijada persistently and even indecently urged and insisted that Silvany should make a will in his favor. The sick man was taken, against the protests of his physician and nurse, to the home of the former mistress of Quijada, the mother of the only other beneficiary of the contested will, when he was so ill that the removal was imprudent and dangerous, but still Silvany resisted the importunities of Quijada to make a will in his favor. Quijada twice brought persons to the house for the purpose of preparing the will. Both times Silvany declined to make the will and once expressed a wish to be taken away from there, saying that they were robbing him, while Quijada accused Silvany of ingratitude for his refusal to make a will favorable to him. Silvany always said he had given his property to the orphans.

And, then, there is Quijada's statement of how the will was prepared and executed, notwithstanding Silvany's persistent refusal to comply with his importunities. On January 7th, "about 4 o'clock, my *compadre* said that he was very sick, and he wanted to make a will." He also told Quijada that he would give certain land to his son Jesus, and the balance of his estate to Quijada, and asked if he liked Flores as administrator, to which Quijada assented, and then Silvany said, "We will put him as administrator and at the same time without bonds." They agreed upon that, and Quijada went to a lawyer and asked him to prepare the will. The lawyer said he would prepare it and meet him with it the next day at Flores' saloon. The next day the lawyer met him at Flores' saloon and read it to Quijada to see if it was as Silvany ordered, and said, "Here is Jesus Quijada with a house, and all the rest is for you. Here is also Flores administrator."

The next day Silvany, being very sick, sent for Flores and Quijada's son Severiano. Assembled at the house there were, besides Silvany, Francisco Quijada, his mistress, Flores, and Severiano.

Then Silvany asked Flores to read the will, which he did in Spanish and English. Then Silvany said, "That's my will, you sign my name to it." Then Flores wrote something and took the paper and a pen to Silvany, who took the tip of the pen and a cross was made. Then "my *compadre* told Mr. Flores to write his name as a witness to the will," which was done. "Then my *compadre* called Severiano, . . . and told him that was his will and to write his name as a witness to it," which was done. "My *compadre* told Mr. Flores to hand the paper to me, which he did, and my *compadre* told me to take care of it, that that was his will." The dying Silvany, uninstructed and without prompting, went through the entire ceremony of the execution and publication of the will just as a lawyer, if present, would have directed, not only omitting no requisite, but everything is done in due order, and it was no small feat for the witness, who has long resided at Los Angeles, but cannot speak English, to recite it so completely and in order. And it was thoughtful on the part of Silvany, who, according to the witness, had consulted no one in regard to the will, of his own motion to suggest that no bond be required of Flores. Otherwise Flores would not have been able to qualify.

But while we can but wonder that all these things were so well done by those from whom we should least have expected it, we are unable to compliment the attorney who drew the will in the same way. He received his instructions as to writing the will solely from one who was practically to get the entire estate under the will. It does not seem to have occurred to him that it would be a proper thing for him to see the proposed testator, to make sure that he wanted to make a will at all, or such a will. And after the will was prepared he did not think it necessary that he should read and explain it to the testator, to satisfy himself that it expressed the real wish of the testator. This was quite out of the ordinary course. But the attorney by appointment went to a saloon, kept by the person who was named as executor without bonds, to read it to the devisee to whom practically the whole estate was left by the will, to learn from him whether it was such a will as the testator wished.

For all this the will may have been an honest will, but if it had been designed to force its execution upon Silvany,

or to forge a will, the course taken was the precise course which might have been adopted. If Silvany was alive and desired to make the disposition of his property, it is strange that the attorney did not ask permission to see him, and was not asked to attend to the execution of the will.

There are other circumstances as much relied upon by the contestants, but these considerations are sufficient to show that the verdict cannot be set aside for lack of evidence.

The order and judgment appealed from are affirmed.

Henshaw, J., and McFarland, J., concurred.

[Sac. No. 566. Department One.—December 20, 1899.]

MINNIE SULLIVAN, Respondent, v. FRANK T. JOHNSON, Appellant.

SALE—DELIVERY AND CHANGE OF POSSESSION—ESTOPPEL OF ATTACHING CREDITOR.—An attaching creditor is estopped to attack the validity of a sale of personal property made by the debtor, on the ground that it was void as to creditors for want of an immediate delivery and actual and continued change of possession, as demanded by section 3440 of the Civil Code, where it appears that the sale was consented to and recognized as valid by the attaching creditor, with full knowledge of the facts that the purchase was made for a valuable consideration, in good faith, and without intent to defraud the creditors of the vendor, and that, acting thereupon, the purchaser was induced to expend a large sum of money, which would not otherwise have been expended.

ID.—CLAIM AND DELIVERY—SHERIFF BOUND BY ESTOPPEL.—In an action of claim and delivery brought by the purchaser against the sheriff who levied the attachment, the sheriff stands in the shoes of the attaching creditor, and is bound by the estoppel against such creditor, and cannot defend the action by justifying under the writ of attachment.

APPEAL from an order of the Superior Court of Sacramento County denying a new trial. Matt. F. Johnson, Judge.

The facts are stated in the opinion of the court.

Albert M. Johnson, for Appellant.

The sale being void as to creditors, the attaching creditor cannot be estopped from assailing it, by mere acquiescence in its validity, without consideration or conduct inducing such an estoppel as is recognized in *Biddle Boggs v. Merced Min. Co.*, 14 Cal. 279. Such an estoppel did not exist in this case. (Bump on Fraudulent Conveyances, sec. 456; *Cole v. Tyler*, 65 N. Y. 73; *Watson v. Sutro*, 86 Cal. 500.)

Hinkson & Elliott, for Respondent.

The facts show an estoppel by the conduct of Mrs. Figg, by which the plaintiff, as purchaser, was prejudiced. (*Escolle v. Franks*, 67 Cal. 138; *Karns v. Olney*, 80 Cal. 100; 13 Am. St. Rep. 101; *Davis v. Davis*, 26 Cal. 40; 85 Am. Dec. 157; *Titus v. Morse*, 40 Me. 348; 63 Am. Dec. 665.)

GAROUTTE, J.—This is an action of claim and delivery, defendant justifying as sheriff under a writ of attachment. Judgment went against him, and he takes an appeal from the order denying his motion for a new trial. This attachment was issued in an action begun by the administrator of the estate of Harriett M. Figg, deceased, against Sarah Andrews. This action involves the right of possession to certain furniture and other household goods situated in a lodging-house, of which personal property plaintiff claims to be the owner, as the vendee of Sarah Andrews. For present purposes it may be conceded that the sale of the property to plaintiff by the defendant in the attachment suit was void as to the plaintiff in that suit by reason of the fact that it was not accompanied by an immediate delivery, followed by an actual and continued change of possession, as demanded by section 3440 of the Civil Code. But it is now claimed upon the part of the plaintiff that Mrs. Figg, and, therefore, this defendant, is estopped from raising the question as to the validity of the sale of the furniture to her. Upon this question of estoppel the court made a finding of fact to the effect that the sale to plaintiff was made for a valuable consideration, in good faith, and without any intent to defraud any of the creditors of Sarah Andrews, the vendor, "all of which facts were well known to the said Harriett M. Figg, who consented to the same, and recognized the validity of the sale. And acting upon said knowledge and acts of the said Har-

riett M. Figg, plaintiff expended a large sum of money, to wit, about one hundred dollars, on and for said personal property, which she would not otherwise have done." We do not deem it necessary to enter into a detailed recital of the evidence to show that this finding has support therein. It is sufficient to say that the evidence does support it, and in view of this finding of fact the defendant, standing in the shoes of the attaching creditor, cannot successfully defend the present action. The case of *Escolle v. Franks*, 67 Cal. 137, is directly in point. It is there stated: "If a creditor make any statement or agreement in effect confirming the sale, 'upon the faith of which the grantee acts as he would not otherwise do, or under such circumstances as his subsequent assertion of his rights as a creditor, if permitted, would operate as a fraud, he would be held to have confirmed the transfer.' (Bump on Fraudulent Conveyances, 458, and authorities there cited.) In this case Tresconi recognized plaintiff's purchase, released his attachment, caused the sheep to be returned over to the plaintiff, and upon the good faith of those acts the plaintiff took the sheep and expended about four hundred dollars in and about their care, which he would not otherwise have done. After all this, to permit Tresconi to question the sale would be to countenance a palpable fraud on the plaintiff."

For the foregoing reasons the order denying the new trial is affirmed.

Van Dyke, J., and Harrison, J., concurred.

[S. F. No. 1137. In Bank.—December 20, 1899.]

PHILIP HANLEY, Appellant, v. CALIFORNIA BRIDGE
AND CONSTRUCTION COMPANY, Respondent.

NONSUIT—MOTION—ADMISSIONS—INTERPRETATION OF EVIDENCE.—A motion for a nonsuit admits the truth of all the plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom; and upon such motion the evidence submitted by the plaintiff is to be interpreted most strongly against the defendant.

ID.—EVIDENCE OF NEGLIGENCE—INTERPRETATION FOR PLAINTIFF—INJURY IN UNTIMBERED TUNNEL.—Upon a motion for nonsuit in an action by an employee to recover damages suffered from the falling of a rock in an untimbered tunnel, evidence that timbers were required to make the tunnel reasonably safe is to be taken in connection with other evidence which, though susceptible of two constructions, may be interpreted in favor of the plaintiff, to the effect that no timbers were provided for use in the tunnel, and that the injury was in a completed part of the tunnel, and such interpretation of the evidence must be taken as true for the purposes of the motion.

ID.—QUESTIONS OF FACT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS.—The question as to the negligence of the defendant and the contributory negligence of the plaintiff or his assumption of the risks of his employment, with full knowledge of its dangers, must be left to the jury as questions of fact to be determined by them, and not disposed of as questions of law upon motion for a nonsuit, where it cannot be said that all reasonable men must draw the same inference as to the freedom of the defendant from negligence, or as to the contributory negligence of the plaintiff, or assumption of risks by him.

MASTER AND SERVANT—DUTY OF MASTER TO PROVIDE SAFE PLACE—PERMANENT TUNNEL—FALL OF OVERHANGING ROCK.—The rule of law requiring the master to provide a safe place in which his servants may work applies to the construction of a permanent tunnel in a mountain, and it is the duty of the master, in so far as the work therein is completed, to make the tunnel reasonably safe, so as to prevent the fall of overhanging rock.

ID.—ACTION OF FELLOW-SERVANTS.—The rule as to the erection of temporary structures by fellow-servants has no application to the construction of a permanent tunnel; and the fact that fellow-servants are engaged in such construction cannot relieve the defendant from his duty to provide a safe place for his servants.

ID.—RIGHTS OF SERVANT—PRESUMPTION.—The servant has a right to presume that the master has performed his duty in making the place in which he is directed to work reasonably safe, and to proceed upon that presumption, unless a reasonably prudent person, in performing the work assigned to him, would have learned facts from which he would have apprehended danger to himself.

ID.—INEXPERIENCED SERVANT—UNOBVIOUS DANGER—ABSENCE OF WARNING—CONTRIBUTORY NEGLIGENCE.—An inexperienced servant is not chargeable as matter of law with contributory negligence, where the danger to him was not so obvious and threatening that a reasonably prudent person in his situation would have avoided it, and where he had no warning of the danger occasioned by the fault of the defendant in not providing a safe place in which to work.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Henley & Costello, for Appellant.

Davis & Hill, for Respondent.

CHIPMAN, C.—Action to recover damages for personal injury while working in a tunnel. The pleadings are verified. The cause was tried by a jury, and at the close of plaintiff's evidence the court granted defendant's motion for judgment of nonsuit. The appeal is from the judgment and from an order denying motion for new trial. Plaintiff introduced evidence tending to show the following facts: Defendant was engaged in the construction of a tunnel at Baker's Beach in San Francisco, and plaintiff was employed by defendant as a laborer, his duty being to load and haul away rock and debris from this tunnel with a wheelbarrow; he was inexperienced in running tunnels, and was working with experienced miners who were skilled and had had long experience in such work; he had been working six and a half days when the accident happened by which he was injured. The tunnel ran into the face of a receding rock bluff which rose up from the ocean beach; as driven in at that time it measured about eighteen feet at the bottom and about fifteen feet at the top, and was eight feet wide and nine or ten feet high; defendant had a superintendent who was in charge of the work and employed the men, and who visited the tunnel once or twice a day, but gave no instructions to the men concerning the work, except generally for them to go on with the tunnel, and he never gave any instructions to the plaintiff, except that when he employed plaintiff he directed him to wheel out the stuff which was blasted down or loosened; on the day of the accident the plaintiff, having laid some planks upon which to run his wheelbarrow was arranging these planks on the bottom of the tunnel, when a rock, weighing about one thousand pounds, fell from the corner or angle where the roof and wall met, about ten feet from the mouth and eight feet from the back end of the tunnel, breaking plaintiff's leg, driving the bones out through the flesh, and seriously

injuring him; the rock fell quickly without giving opportunity to escape, and plaintiff heard no noise before it fell; the tunnel had passed this place three or four days before the rock fell; the rock which fell differed from the others "in that it had a kind of diamond shaped point projecting into the tunnel," and was in size about two by two and one-half feet; before it fell "plaintiff did not notice any definite boundaries around it, nor whether the edge of the rock could be seen; that he had noticed this rock hanging there for three or four days before it fell." Timon, one of the miners helping to drive the tunnel, a witness for plaintiff, testified: "That the bluff into which the tunnel was being driven was seamy rock; that he thought the tunnel should have been timbered three or four days before to prevent the falling of rock and make it reasonably safe; . . . that for three or four days he, Timon, had thought that rock dangerous [referring to the rock which did the injury], but that there was no visible cleavage or breaking around the rock"; he "didn't tell plaintiff it was dangerous or say anything to him about it, because he didn't think it his business to speak about it"; he spoke to the other two men about it and they paid no attention to it; the rock could not be seen from the surface but only inside; a small stream of water ran down the face of the bluff over the tunnel, and the wall of the tunnel where this rock was located was damp, and he thought this water seeping through would loosen the rock "and let it fall sooner than it otherwise would on account of its not being timbered"; the other two miners "were trying to let the rock hang until they had got another center; they left it, thinking, perhaps, it would stay there; that the way to have made the tunnel reasonably safe for the men working in it would have been to have timbered it." He was asked if there were not timbers there for this tunnel. He answered: "There was none before the rock fell. There were no timbers there before the rock fell. They were on the ground, I guess, but we did not have them in the tunnel." Being again asked, he answered: "No timbers were there until the rock fell; not that I saw; not for the tunnel. There were timbers there for the sewer; but they had no timbers in the tunnel until the rock fell upon the man." He further testified that they had, a half

an hour before the accident, fired some blasts, and he was picking down the loose rock from the blasts when the rock fell, and plaintiff stood near him; their custom was to light the fuse to fire the blasts and go out to await the explosion, and then return quickly, and, "by using the pick and striking the walls and listening, would discover where rock had been loosened and was liable to fall and pick that down in order to avoid the danger of falling rock"; this was done just before the accident; a blast had been put in the front of the tunnel and one opposite this rock at the top of the tunnel, and one opposite near the bottom; after the explosion witness went into the tunnel and "was picking down the loose rock, the plaintiff went about adjusting the planks on which to run the wheelbarrow"; at this time it was "the rock fell, and without noise, and plaintiff received his injuries." Sheridan, a witness for plaintiff, testified that he had been engaged thirty years in constructing tunnels, and had gone out to look at this ground with a view to bidding on the contract. "Q. And from your observation of it and your experience as a miner, I will ask you whether it is ground of such character as, to insure reasonable safety in tunneling, would or would not require timbering? A. That would depend altogether upon the size of the excavation. Q. Suppose the excavation was a tunnel of about ten feet wide and ten feet high? A. In that character of rock, I should judge that it would require some timbering." He further testified that many tunnels are run without timbering, depending upon the hardness of the rock and the course of the cleavage and circumstances of the case; that it is not customary in small tunnels to timber, depending upon circumstances; that a practical miner understands all these matters, and if he wants to work in a dangerous place it is his own risk; "but he should insist upon having it timbered where the character of the rock is dangerous; where it is seamy"; that the timbering is generally done by the miners, but not always; that experienced miners are often deceived "and something falls in where they have thought the tunnel safe," and "often where it looks as if the walls of the tunnel might fall in it does not fall but remains."

1. Respondent devotes some attention to the evidence of the witness Timon to show that it is susceptible of a different

meaning than that given it by appellant, and otherwise comments upon the weight of certain evidence; for example, that the result of Timon's testimony was that timbers were at the tunnel ready to be used for timbering, and not, as claimed by appellant, that there were no timbers there except for the sewer. The motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against defendant. (*Goldstone v. Merchants' etc. Storage Co.*, 123 Cal. 625.) This rule must be applied to all the evidence submitted by plaintiff.

2. The contention of respondent may be summarized as follows: That the three experienced employees and plaintiff were fellow-servants, and this fact was for the court to determine; that the injury resulted from the negligence of these men, and if the duty of removing the dangerous rock rested more directly upon the skilled and experienced workmen, still the rule applies to all fellow-servants, though working in different capacities, and the employer is not liable to one who is injured by the negligence of another; that though it be the duty of the employer to furnish the employee a safe place in which to work, in the present case the rule has no application because the employer did not furnish the place, but plaintiff and the other three furnished the place by making the tunnel (citing *Callan v. Bull*, 113 Cal. 593); that the nature of the work to be done by plaintiff and the condition of the tunnel were visible facts and the dangers of the employment known to him and he assumed the risks (citing *Vaughn v. California etc. Ry. Co.*, 83 Cal. 18, and other cases); and finally that the facts show contributory negligence.

The complaint charges "that said defendant, in violation of its duty to furnish this plaintiff with a safe place to work, negligently and carelessly failed to properly or at all brace or timber said tunnel." This allegation is not denied. The evidence tends to show that the materials through which the tunnel was being driven were of a character requiring it to be timbered to be reasonably safe; the superintendent having charge of the work visited the tunnel once or twice a day, and must be presumed to have known as much as his workmen with regard to the general requirements to make the place

reasonably safe from a danger such as befell plaintiff, even though it does not appear that he had actual knowledge of this particular overhanging rock; and it was his duty to ascertain the condition of the tunnel as to its safety. Among the requirements necessary to the safety of the workmen, as the evidence tends to show, were timbers to be placed in the tunnel, and the evidence also tends to show that none were supplied for this purpose although there were timbers for the sewer.

I cannot agree with respondent's counsel that the rule of law which requires the master to furnish a safe place in which his servants may work does not apply to this case as it presents itself; what further evidence might disclose is not now to be considered. In *Callan v. Bull*, *supra*, relied upon by respondent, the facts presented a different case from this. There the workmen were engaged in constructing a jetty. To do this certain temporary structures were necessary, and it was through the defects in one of these that the injury occurred. In speaking of the rule we are now considering the court said: "Manifestly, the place at which the work was to be done was not provided by the defendant, nor can it be said that different portions of the work in which the laborers might be engaged as it progressed was the 'place' furnished by their employer, within the meaning of the above rule, or that the bent or trestle, from which was suspended the mat on which the plaintiff was at work at the time of his injury, was one of the appliances to be furnished by the defendant." The soundness of these views need not be and are not questioned. Elsewhere in the opinion it was said that the rule "has no application when the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation." Among the cases cited in support of the opinion is *Coal etc. Co. v. Clay*, 51 Ohio St. 542, where certain laborers in a coal mine were injured by the falling in of the roof by reason of its not being suf-

ficiently propped, and the court held that "the place was not furnished as in any sense a permanent place of work, but was a place in which surrounding conditions were constantly changing, and, instead of being a place furnished by the master for the employees, within the spirit of the rule referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform." What was said in *Callan v. Bull*, *supra*, and what we find in the Ohio case must be read in the light of the facts before the court. Where a permanent tunnel is driven into a mountain to open up veins of mineral, or pierces a mountain to furnish a permanent bed for a railroad, we think that as fast as it is completed the finished tunnel becomes an appliance or means furnished by the master by which the remaining work is to be prosecuted. Some of the great railroad tunnels of this century—for example, the Hoosac and Mont Cenis tunnels—required years for their completion from end to end. It would be most unreasonable to hold that the laborer employed upon the unfinished portion of one of these tunnels must take a fellow-servant's risk in passing through miles of completed work to get to his place of employment; nor can we see that the case would be different where he himself helped to complete the finished portion. The evidence before us is not entirely clear as to whether the tunnel in question was completed at the point where the accident occurred so as to bring it within the reason of the rule we are discussing, but there was not sufficient evidence on the point to justify the court in holding that portion of the tunnel not to be completed in the sense we are considering a completed tunnel.

The evidence is that the tunnel had been driven in about eighteen feet and that it was about eight feet wide and from nine to ten feet high; that the rock that fell was in the top of the tunnel and was about ten feet from the mouth and eight feet from the back end of the tunnel; that the tunnel had passed the place where the rock fell about three or four days. These expressions seem to imply a completed tunnel to the extent named—at least must be so taken on this motion. There is other evidence showing that for some reason, not fully nor intelligently explained, two blasts were put in the side of the

tunnel opposite where the fatal rock was hanging. This might possibly imply that at that point the tunnel was not entirely completed. We do not think, however, that we are sufficiently enlightened by the evidence as now before the court to warrant us in saying that it takes the case out of the rule we are considering. We do not think that the court on this motion should assume on such evidence as this to say that the tunnel was not completed at the point in question, and that at that particular point the "place" was not such as it was the duty of the employer to furnish and to see that it was reasonably safe.

I think the view we have taken of the rule under consideration is fully supporter in *Union Pac. Ry. Co. v. Jarvi*, 53 Fed. Rep. 65, and in *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484. In the first of these cases Jarvi was a coal miner. He was injured by a rock falling upon him from the roof of one of the tunnels by which he had access to the place where his particular work called him. The case was heard before Caldwell and Sandborn, circuit judges, and Shiras, district judge. The opinion presents a careful review of the law upon the question here. The court said: "It is the duty of the employer to exercise ordinary care to provide a reasonably safe place in which his employee may perform his service. It is his duty to use diligence to keep this place in a reasonably safe condition, so that his servant may not be exposed to unnecessary and unreasonable risks. The care and diligence required of the master is such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury. It must be commensurate with the character of the service required, and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. . . . For a failure to exercise this care, resulting in injury to the employee, the employer is liable; and this duty and liability extend, not only to the unreasonable and unnecessary risks that are known to the employer, but to such as a reasonably prudent man in the exercise of ordinary diligence—diligence proportionate to the occasion—would have known and apprehended." Further, as to the duty of the master and the rights of the servant it was said: "The latter [the servant] has a right to presume, when directed to work in a particular

place, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably prudent and intelligent man in the performance of his work as a miner would have learned facts from which he would have apprehended danger to himself." Upon the question of contributory negligence it was said: "The degrees of care required of the master and servant also differ, because defects in a piece of machinery or in the roof of a mine that to the eye of a competent inspector, such as the master employs, portend unnecessary and unreasonable risks and great danger, may have no significance to a laborer or miner who has had no experience in watching and caring for machinery or roofs of slopes in a mine, and the latter is not chargeable with contributory negligence simply because he sees or knows the defects, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which these defects indicate. The dangers and defects merely must have been so obvious and threatening that a reasonably prudent man would have avoided them in order to charge the servant with contributory negligence." These principles are supported by numerous cases cited in the opinion and seem to us a clear and sound exposition of the law.

Applying these rules of law to the facts of this case, ought the court to have nonsuited the plaintiff? In actions like the present one, questions of negligence are for the jury to determine; and it is only when the facts are undisputed and are such that reasonable men can fairly draw but one conclusion from them that the question of negligence is ever considered one of law for the court. (*Union Pac. Ry. Co. v. Jarvi, supra*, and cases cited.) We do not think the case as it comes to us here is one where all reasonable men must draw the inference that the plaintiff was guilty of, or the defendant free from, negligence.

In *Kelley v. Fourth of July Min. Co., supra*, plaintiff was working in a mine and was an experienced miner. His work was at the face of the tunnel which he was helping to run. He was injured by the falling of rock from the roof of the tunnel a short distance behind where he worked. The facts were not in all particulars as in this case, but they presented the question now before us and it was decided that: "Where

a miner is engaged in running a tunnel, drilling and blasting from its face, the employer is bound to furnish a safe place for work, by using proper precautions to prevent the falling of the roof of that part of the tunnel already created, and by keeping the floor so free of debris as not to obstruct his escape in case of accident." (Syllabus.)

Plaintiff had no knowledge of or experience in running tunnels; he neither knew, and, because he was inexperienced, had not the means of knowing, that the tunnel was unsafe without timbers; he saw this overhanging rock, but it presented to him no evidence of loosening and no cleavage from around its edges was visible; and it was high above his head and beyond his reach; his fellow-servants were skilled in mining and they gave him no warning, although at least one of them thought it liable to fall; the superintendent visited the mine daily and he gave no warning and took no steps for the safety of plaintiff; a witness of long experience in running tunnels testified that in his opinion the tunnel would require some timbering, and in his opinion he was corroborated by the witness Timon. We cannot say that the facts were such that the court had the right to consider the question of negligence involved as one of law for the court. We do not deem it necessary to discuss the other points made by defendant, for, conceding that the men on the work were fellow-servants, it was still the duty of defendant to furnish them a reasonably safe place in which to work. Whether the nature of the work to be done by plaintiff and the condition of the tunnel were visible facts, and the dangers of the employment were known to plaintiff, were questions of fact as to which there was at least some evidence which should have gone to the jury. The decision of the lower court seems to have turned on the proposition that the case was similar to *Callan v. Bull*, *supra*, and was controlled by the rules applied in that case. But we think the circumstances attending the injury in this case clearly distinguishable from those found to exist in *Callanan v. Bull*, *supra*, and that the cases in 53 Federal Reporter and 16 Montana, *supra*, more nearly illustrate the principles which should govern here.

It is advised that the judgment and order should be reversed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

Temple, J., Garoutte, J., Harrison, J., Van Dyke, J., Henshaw, J.

McFarland, J., dissented, and thought that the judgment should be affirmed.

[Crim. No. 507. In Bank.—December 21, 1899.]

THE PEOPLE, Respondent, v. JOAQUIN ESLABE, Appellant.

CRIMINAL LAW—EVIDENCE—DEPOSITIONS TAKEN AT PRELIMINARY EXAMINATION—FILING OF ORIGINAL NOTES.—Upon the trial of a defendant under a charge of felony, in the superior court, the deposition of a witness taken at the preliminary examination and contained in the transcript of the notes of the official reporter, cannot be objected to as evidence after proof of the death of the witness, upon the ground that it has not been first affirmatively shown that the stenographic reporter had filed his original notes with the county clerk as required by subdivision 5 of section 860 of the Penal Code.

ID.—ABSENCE OF FILING OF NOTES—CURE OF IRREGULARITY.—The fact that the notes were not filed in fact when the deposition was admitted is without prejudice to the defendant, as an irregularity, where it appears that the notes were actually filed with the county clerk before the conclusion of the trial.

ID.—CONFESSIONS—PROOF OF VOLUNTARINESS.—The confessions of the defendant are admissible, if proved to have been freely and voluntarily given, and made without duress, or inducement, or promise.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

A. L. Frick, and W. B. White, for Appellant.

Tirey L. Ford, Attorney General, for Respondent.

THE COURT.—The defendant, convicted of murder in the first degree, appeals from the judgment and from the order denying his motion for a new trial.

John Metz was a witness at the preliminary examination of the defendant. At the trial it was shown that he was dead. His deposition, taken at the preliminary examination and contained in the transcript of the notes of the official reporter at that hearing, was offered in evidence. Objection to its introduction was made upon the ground that it had not affirmatively been shown that the stenographic reporter had filed his original notes with the county clerk as required by section 869, subdivision 5, of the Penal Code. The objection was overruled and the deposition admitted in evidence. There was no error in this ruling, and if there was any irregularity it was without injury to the defendant, in view of the fact that the notes were actually filed with the county clerk before the conclusion of the trial. In *People v. Grundell*, 75 Cal. 301, another provision of section 869 of the Penal Code, which requires that the transcript of the reporter's notes shall be filed with the clerk within ten days, was held to be directory and not mandatory. The provision here under consideration merely requires that the reporter shall file his original notes with the county clerk, and this, as has been said, was done before the conclusion of the trial.

The defendant made statements in the nature of confessions to several different persons who were witnesses at the trial. Objections were interposed to the reception as evidence of these statements, upon the ground that it was not shown that they were freely and voluntarily made. The objection, however, finds no support in the record, which discloses that in each instance before the admission in evidence of the defendant's declarations it was proved that they were freely and voluntarily given and made neither under duress, nor inducement, nor promise.

These being the only matters called to our attention upon this appeal, the judgment and order appealed from are affirmed.

[L. A. No. 500. Department One.—December 22, 1899.]

SOUTH SAN BERNARDINO LAND AND IMPROVEMENT COMPANY, Appellant, v. SAN BERNARDINO NATIONAL BANK, Respondent.

RESULTING TRUST—PART PAYMENT OF PURCHASE MONEY—PURCHASE OF TITLE UNDER EXECUTION—NOTICE OF EQUITY.—A payment of part of the purchase money of land, the legal title to which is held by another, carries with it by resulting trust a proportionate equitable estate in the land purchased, which may be enforced in equity against a subsequent purchaser of the legal title under execution, who took with notice of the equity.

ID.—PLEADING—GENERAL DEMURRER—UNCERTAINTY.—A complaint to enforce a resulting trust which states facts showing a sale, and the proportion of the price paid by each purchaser, and bringing the case clearly within the rule requiring the enforcement of an equity against the defendant, is good as against a general demurrer, and any uncertainty as to the time of payment of the purchase price cannot be objected to if not urged as a ground of special demurrer.

ID.—REVIEW UPON APPEAL—OBJECTION TO COMPLAINT BY RESPONDENT.—Upon appeal by the plaintiff, an objection by the respondent to the complaint cannot be heard, unless it is so defective in averment that it would not support any judgment in plaintiff's favor.

ID.—FORMER JUDGMENT—RES ADJUDICATA—IMPROPER ACTION TO QUIET TITLE.—A former judgment between the parties is only conclusive when the same thing under the same title is litigated. A former judgment against the plaintiff in an action which he was not entitled to maintain as a *cestui que trust* to quiet his title against the defendant who was his trustee of the legal title, cannot estop him from maintaining a subsequent action which he is entitled to maintain to enforce a resulting trust in his favor against the same defendant.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial.
John L. Campbell, Judge.

The facts are stated in the opinion.

Caldwell & Duncan, for Appellant.

John G. North, and Curtis & Curtis, for Respondent.

GRAY, C.—This is an action to enforce a trust and compel a conveyance. The plaintiff appeals from the judgment and from an order denying a new trial.

1. The substance of the complaint is that one Rosenthal and seven others bought certain lot of the rancho of San Bernardino, said Rosenthal and five others paying each one-tenth, and the other two each paying two-tenths of the purchase price of said lots. That the eight persons were to have proportionate interests in the land purchased equal to the amount paid by each of them. That they subsequently received a deed to the lots, which deed failed to designate the interest conveyed to each of the grantees. That thereafter all the grantees named in said deed formed the corporation plaintiff, and all except Rosenthal conveyed all their interest in the property to the plaintiff. That Rosenthal conveyed an undivided one-tenth of said property to one Boggs, who subsequently conveyed the same to plaintiff. That thereafter defendant herein, in a suit against said Rosenthal and another, seized, sold, and bought in under execution all the right, title, and interest of said Rosenthal in and to said property and obtained a sheriff's deed therefor. That defendant purchased said property with notice of plaintiff's right therein. That plaintiff had demanded a conveyance of defendant, which defendant had refused. Plaintiff prays that defendant be declared a trustee of the legal title for the benefit of plaintiff, and that defendant be compelled to convey to plaintiff.

2. The first question to be determined is that raised by a general demurrer to the complaint: Does the complaint state a cause of action?

It appears from the facts set forth in the complaint, and recited above, that while Rosenthal paid but one-tenth of the purchase price of the property, there was conveyed to him by the deed and undivided one-eighth of said property. Having thereafter conveyed to the plaintiff corporation a one-tenth interest in the property, there was still left some sort of title in him to an undivided one-fortieth of said property, and to this one-fortieth the defendant has succeeded. The question is, Do the facts stated in the complaint show that the defendant holds this one-fortieth interest in trust for plaintiff? If this question is answered in the affirmative, then the complaint states a cause of action.

It is settled law that where one pays the purchase price of land and the land is thereupon conveyed to another, the title to the land is held, under such conveyance, in trust for the person who has paid the purchase price (Civ. Code, sec. 853.) This principle is also applied so as to make the payment of a part of the purchase money carry with it a proportionate equitable estate in the land purchased equal to the amount paid (2 Pomeroy's Equity Jurisprudence, sec. 1038); and the *cestui que trust* may, in a court of equity, compel a conveyance to himself of the legal title as well from anyone succeeding to the title of the trustee, with notice, as from the trustee himself (2 Pomeroy's Equity Jurisprudence sec. 1043; (*Case v. Coddington*, 38 Cal. 191; *Murphy v. Clayton*, 113 Cal. 153.) The facts stated in the complaint show a sale and the proportion of the price paid by each grantee, and bring the case clearly within the principle of the authorities cited above, and the complaint is certainly good as against the general demurrer interposed. If there is any uncertainty in the complaint as to the time of the payment of any part of the purchase price of the land by any of the vendees, such uncertainty could only be reached by special demurrer based upon that ground. In the absence of any special demurrer to the complaint it is unnecessary to specially notice the other points urged in respondent's brief as to the sufficiency of the complaint. It may be proper also here to say that the defendant, not having appealed, cannot be heard on any objection to the complaint unless the complaint is so defective in averment that it would not support any judgment in plaintiff's favor. (*Bates v. Babcock*, 95 Cal. 479; 29 Am. St. Rep. 133.)

3. Defendant pleaded in bar a judgment, in his favor and against plaintiff, rendered in a former action to quiet title, which action was brought by plaintiff herein against defendant herein, and the judgment of the court below in defendant's favor is based entirely on a finding favorable to defendant on this plea in bar.

In an action to quiet title the relief sought in the case at bar could not be obtained. This action, being to enforce a trust and compel a conveyance, proceeds on the theory that the legal title is in the defendant, whereas a suit to quiet title ordinarily proceeds upon a contrary theory, and can-

not be maintained against the holder of the legal title. The former judgment is conclusive between the parties only "when the same thing under the same title" is litigated. (Code Civ. Proc., sec. 1908.) We think, therefore, that the findings of the court and conclusions of law should have been for plaintiff on the plea in bar. Plaintiff should not be estopped from maintaining an action for relief that he is entitled to on the facts as they exist because he previously mistook his remedy and tried to maintain an action that he never was entitled to. The foregoing views find support in the following cases: *Von Drachenfels v. Doolittle*, 77 Cal. 295; *O'Connor v. Irvine*, 74 Cal. 435; *Harrigan v. Mowry*, 84 Cal. 457; *Shanahan v. Crampton*, 92 Cal. 9.

We advise that the judgment and order denying a new trial be reversed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

Harrison, J., Garoutte, J., Van Dyke, J.

[Crim. No. 531. Department Two.—December 22, 1899.]

THE PEOPLE, Respondent, v. W. R. BLACKMAN, Appellant.

CRIMINAL LAW—TRIAL FOR FELONY—ABSENCE OF JUDGE FROM COURTROOM.—There can be no court without the presence of the judge, who is a component part of the court; and the absence of the judge from the courtroom during any part of the trial of a defendant for a felony, though he may be within hearing of the courtroom, is prejudicial error entitling the accused to a new trial.

ID.—EMBEZZLEMENT BY SECRETARY OF CORPORATION—EVIDENCE—BOOKS OF CORPORATION.—Upon a charge of embezzlement against the defendant, who was secretary of a corporation, the books of the corporation, showing a shortage, kept by a bookkeeper who committed suicide about the time when the shortage was discovered, are not admissible against the defendant, without proof that he knew their contents, and was responsible for their condition.

ID.—NEGLECT OF DUTY AS SECRETARY—PRESUMPTION.—No mere neglect of the duty of the defendant as secretary to examine the books

of the corporation can sustain a charge of embezzlement, and the presumption of innocence will overcome all presumptions of knowledge or control of the secretary over the books.

Id.—BOOKS OF COLLECTORS AND OF BANK.—Books of the collectors for the corporation, and of a bank in which deposits were made, not proven to be correct by those who kept them, are inadmissible against the secretary of the corporation, who is charged with embezzlement; and, if offered to show that the defendant did not keep correct books, the presumption of correctness is destroyed, and they cannot be received as admissions without proof of his knowledge and complicity in falsifying the books.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

W. H. Shinn, Frank G. Finlayson, and Earl Rogers, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

THE COURT.—Defendant was convicted of a felony. Upon the hearing of the motion of defendant for a new trial two affidavits were read in its support, made by two different persons who were present at the trial. In substance they deposed that after the court had instructed the jury, and while the district attorney was addressing the jury, the presiding judge left the bench and the courtroom and went into another room, closed the door behind him and was absent from the courtroom about ten minutes, during which time the district attorney proceeded with his argument to the jury upon the facts of the case. No affidavit disputing these facts or explaining the absence of the judge was made by anyone. Defendant's affidavits were filed with the notice of motion for a new trial, and when the motion came on to be heard and the affidavits were read the court made the following remark: "What! what! The court knows of its own knowledge that it was not absent any such time or in any such manner, and was not out of hearing of counsel while arguing said cause at any time, and that the door of my chamber was open at that time, and even when the door is shut I can hear all

that is going on in the courtroom." The attorney general cites *Southern etc. Co. v. National Bank*, 100 Cal. 316, in which the court quotes from a Nevada case "that in all motions before a judge, during the progress of the trial, he may act on his own knowledge in regard to things which in their nature are better known to himself than they could be to others." The motion in both these cases was for transfer of the place of trial upon the ground that the judge was interested in the cause, and in the case in 100 California the affidavit was not to the fact that the judge was disqualified by reason of interest, giving the disqualifying facts, but it was that, as affiant was informed and believed, the judge had said he considered himself disqualified. It has been held here recently that a motion to transfer a cause, on the ground of the bias of the judge, must be decided on affidavits (*People v. Compton*, 123 Cal. 403); so that the above rule does not apply in that kind of a case; nor do we think it would apply where the facts as shown clearly disqualify the judge as interested in the cause of action. The judge's belief cannot overcome the legal conclusion to be drawn from the facts. The attorney general also claims that the statement of the judge from the bench must be received as a refutation of the facts set forth in the affidavits. We are not called upon to decide whether the statement of the court is to be received as the equivalent of an affidavit in all cases, or whether the rule in the case of *People v. Compton, supra*, applies, as is claimed by defendant. The facts stated in the affidavits were not in their nature better known to the judge than to others in the courtroom—the sheriff, the clerk, counsel, and bystanders. If the statements were untrue, the fact could have been easily so shown by affidavit. But the statement of the judge, treated as an affidavit and given its full effect as such, does not controvert the affidavits presented with the motion in all their essential facts. In *People v. Tupper*, 122 Cal. 424, 68 Am. St. Rep. 44, the court said: "The judge is a component part of the court. There can be no court without the judge. And all that was done in the absence of the judge was done in the absence of the court. A defendant convicted under such circumstances has been deprived of his liberty without due process of law." In

State v. Beuerman, 59 Kan. 586, cited in the above case, it was said: "He [the judge] cannot even temporarily relinquish control of the court or the conduct of the trial. . . . It is especially important that he should be visibly present every moment of the actual progress of a criminal trial where the highest penalty of the law may be imposed. . . . If the presiding judge abandons the trial, or relinquishes control over the proceedings, the accused has good cause to complain." (Citing numerous cases.) Admitting all the judge said to be true, there is not in the statement sufficient to disprove the fact; indeed, it inferentially concedes that he relinquished control of the case for the time. Something more is required of the presiding judge than that he should be within hearing. That might be true if he were on the street and the windows of the courtroom open; and it may be true in this case, as the judge stated, that when in the adjoining room, with the doors shut, he "can hear all that is going on in the courtroom," but it must be obvious that he would be in no position to have control of the proceedings and certainly would not be presiding in the cause when in an adjoining room with the door open or shut. If any misconduct took place in the courtroom during such absence there would be no judge present to whom defendant's counsel could make complaint, or to determine what occurred in his absence. Upon the authority of *People v. Tupper*, *supra*, we must hold the conduct of the judge to be prejudicial error.

Objections were made to the introduction of the books of the corporation; that the evidence was mere hearsay and was incompetent; that it was not made to appear that the defendant had ever seen or knew of the entries offered, and the evidence was incompetent to establish any fact against him.

A great many entries made in a great many books were offered and received over the objection of defendant. It appeared that some of the entries were in the handwriting of defendant and others were not. They were introduced, not only to show the receipt of money by the defendant, but also to show forced balances, and thereby to raise the presumption of guilt. The bookkeeper was not sworn as a witness, but they were merely shown to be books kept by the company. Bolton, the bookkeeper, at about the time the shortage was discovered, had committed suicide.

The position of the learned judge of the trial court was stated by him: "This is one of the books of the company. He is charged by the by-laws and the custom of the company with the keeping of the books. This book was presumably in his custody and under his control. I don't care who kept it. If there is anything wrong about it that is for the defense." As a matter of course, this view is not insisted upon here. The presumption of innocence would overcome all the presumptions of knowledge and control, if they existed, and it was for the prosecution to show that the defendant was responsible for the condition of the books, and in a criminal proceeding it is not enough that it was his duty to know of their contents, and that in a civil action they would be competent evidence against him on that ground. He cannot be held for the crime of embezzlement because he has negligently performed his duty as secretary of the corporation, but such consequence might result under the rulings of the court. Most of the books were in the handwriting of Bolton. It was not shown that defendant examined them to see that they were correct, or, save by the presumption mentioned, that he knew anything about them. Books kept by the collectors were also introduced without any evidence as to their correctness, and that defendant ever saw them, and the same is true as to the books of the bank showing what deposits were made.

The books were certainly not admissible as shop-books. The receipt of such books in evidence is an exception to the general rule, and they are admitted for a limited purpose only. This case is clearly not within the exception. (1 Greenleaf on Evidence, sec. 120 b.)

Aside from shop-books kept by one of the parties to an action, "regular entries made in the course of business" are sometimes received. (1 Greenleaf on Evidence, sec 120.) Such entries must be made in pursuance of some system which is a part of the business, should be nearly contemporaneous with the event, and made by one who knew the fact and had no interest in making a false entry. In short, the motive for making the entries must be solely to record the truth and not to misrepresent. The illustration given by Greenleaf are entries made by "one sending orders or bills, by a notary sending protests, a cashier sending notices

of nonpayment, a marine inspector certifying to a vessel's condition, an attorney keeping a book of proceedings, an asylum officer keeping a weather record, records of baptism or marriage by priest or minister." In all these cases the record was made only because it was deemed important to preserve in perpetual memory what actually occurred. There was no inducement to make a false record, but, on the contrary, false entries in most of the cases would be misleading and injurious.

It must be kept in view that, after all, such evidence is hearsay and secondary, and is receivable only when better evidence cannot be had, and in the special cases which come within the rule. Being entries made in due course of business does not make them primary evidence.

There is much plausibility in the contention that they are admissible, as against an employee, to show what amount of money was received by the corporation, and when it was received, provided, of course, there is nothing which tends to impeach the record as truthful. In this case one purpose for which the books were offered was to show that defendant did not keep correct books, but that they were falsified for the purpose of enabling the defendant to perpetrate the crime, or for the purpose of concealment. Under such circumstances they cannot be received as regular entries made in the course of business. The presumption of correctness it destroyed, and they are not offered as proof of the facts recited.

If there was evidence that the entries were made by the defendant or under his direction, or with his knowledge, they would most undoubtedly be competent and important evidence against him. They are clearly inadmissible, except as admissions, or as acts done in furtherance of the crime charged against him. His knowledge and complicity in falsifying the books must first be shown. The presumption of innocence with which the law clothes the defendant is sufficient to overcome the presumption which might prevail in a civil case, that he knew because it was his duty to know. As before stated, he is not to be punished criminally for negligently performing his duty.

As a new trial must be had on other grounds, it is not necessary to discuss this matter further. The books kept by the collectors and the bank-books should have been offered

in connection with the evidence of those who kept them. As primary evidence could have been had in these cases, there was no excuse for offering secondary evidence

The judgment is reversed and the cause remanded for a new trial.

[L. A. No. 591. Department Two.—December 22, 1899.]

OLIVE A. BYRNE, Appellant, v. JOSEPHUS HUDSON,
Respondent.

MORTGAGE BY DEED ABSOLUTE—TITLE OF MORTGAGOR.—In this state a deed absolute in form, but intended as a mortgage, is a mortgage, and conveys no title to the grantee named in the instrument.

ID.—ACTION TO DECLARE DEED A MORTGAGE—POWER OF COURT—STRICT FORECLOSURE—ERRONEOUS JUDGMENT.—In an action to have it adjudged that a deed from plaintiff's grantor to the defendant is a mortgage, the court, after having found that it is a mortgage, has no power under our system to make a strict foreclosure thereof in the action, and to bar and destroy plaintiff's equity of redemption and other right to the property at the end of twenty days after written notice of the judgment, if the mortgage should not then be paid. Such a judgment is erroneous, though, perhaps, not void, if not appealed from.

ID.—WRITTEN NOTICE OF JUDGMENT—FORFEITURE OF RIGHTS.—The provision in the judgment for a forfeiture of the plaintiff's rights within twenty days after written notice of the entry of the judgment, if no redemption should be made within that period, must be construed as requiring a separate written notice expressly intended for the purpose of starting the period of time mentioned in the judgment.

ID.—INCIDENTAL RECITAL IN NEW TRIAL NOTICE—KNOWLEDGE OF JUDGMENT.—A mere incidental recital of the rendering of the judgment in a notice of motion for a new trial is not a sufficient compliance with the terms of the judgment respecting written notice; nor is the actual knowledge by plaintiff of the rendition of the judgment material upon the question of such compliance.

ID.—FINAL JUDGMENT BARRING PLAINTIFF'S RIGHTS—APPEAL.—A subsequent judgment assuming to bar the plaintiff from all equity of redemption or other right to the mortgaged premises, and dismissing the action for noncompliance with the terms of the judgment as to the time for redemption, is a final judgment as respects the rights of the plaintiff, and is appealable by the plaintiff as such.

APPEAL from a judgment of the Superior Court of Riverside County. J. S. Noyes, Judge.

The facts are stated in the opinion of the court.

J. W. Stephenson, and Charles R. Gray, for Appellant.

G. A. Skinner, and A. A. Adair, for Respondent.

McFARLAND, J.—The transcript in this case is disjointed and confused; but, as supplemented by a certificate of the clerk of the lower court filed here at the date of the oral argument, it is discoverable therefrom that this is an appeal by plaintiff from an order or judgment, rendered August 6, 1897, and entered in the judgment-book October 6, 1897, ordering and adjudging that plaintiff is barred from all equity of redemption, "or other right," to certain mortgaged premises described in the complaint, and dismissing the action. The parties to the action have produced complications by omissions to assert rights at the proper time and in the proper way, and by acts of such uncertain character as to create embarrassments which ordinary carefulness would have entirely avoided.

It is averred in the complaint, substantially, that plaintiff is the owner of certain described real property, and that defendant has a deed from plaintiff's predecessor in interest which on its face purports to absolutely convey said real property to the defendant, but that said deed was intended as a mortgage to secure a loan of three hundred dollars, with interest; that she tendered said amount to the defendant and demanded a deed from him, and that defendant refused to accept this money, and claims that he owns absolute title to the premises. The prayer is that the conveyance to defendant "be adjudged to be a mortgage," and that defendant be decreed to execute a conveyance to plaintiff of the property, and that upon his failure to do so the court appoint a commissioner to make such conveyance. The court found the facts to be as alleged by plaintiff. By the judgment it was decreed that upon the payment by plaintiff to defendant of the sum of three hundred and six dollars—the amount found to be due on the mortgage—the defendant execute a deed conveying the premises to the plaintiff, and upon his failure to do so that the clerk be appointed a commissioner for that

purpose. The judgment then proceeded as follows: "And if the plaintiff fails to pay to the said defendant the sum of three hundred and six dollars, without interest, within twenty days after written notice of the entry of the judgment, that then she be barred from all equity of redemption, or other right to said property." The part of the judgment last quoted was unwarranted. It is definitely settled in this state that a deed absolute in form but intended as a mortgage is a mortgage, and conveys no title to the grantee named in the instrument. It has been declared that sections 2924 and 2925 of the Civil Code were intended to abrogate the rule stated in *Hughes v. Davis*, 40 Cal. 117, and to restore the rule declared in *Cunningham v. Hawkins*, 27 Cal. 603, and *Jackson v. Lodge*, 36 Cal. 28. (See *Brandt v. Thompson*, 91 Cal. 461; *Taylor v. McLain*, 64 Cal. 513; *Healy v. O'Brien*, 66 Cal. 519; *Raynor v. Drew*, 72 Cal. 307.) The rule is stated in *Cunningham v. Hawkins*, *supra*, as follows: "A mortgage under our system, as between the parties, does not pass the legal title to the grantee. The title remains in the mortgagor until it is divested by foreclosure and sale, whatever the terms of the mortgage may be." In the case at bar, the court, having found that the instrument in question was a mortgage and that the parties occupied the relation toward each other of mortgagor and mortgagee, had no power to bar and destroy the plaintiff's title to the property at the end of twenty days—as we have under our system no such thing as a strict foreclosure. The court, having declared the instrument to be a mortgage, then seemed to proceed upon the theory that the relation of the parties was that of vendor and vendee under a contract of purchase, and that plaintiff's rights should be ended unless she paid the purchase money within a certain reasonable time. And the case is not one where the plaintiff was seeking to recover possession of the mortgaged premises, which, of course, could not be done without payment or tender of the amount due by the mortgagor. It seems unavoidable to notice this erroneous feature of the judgment; although, as plaintiff has not appealed from that part of the judgment, she is, perhaps, not in the position now to take advantage of the error.

Treating the judgment, as the parties treat it, as a proper

and valid judgment, the only two points presented are: 1. Is respondent's contention that appellant did not pay the money within twenty days after written notice maintainable? and 2. Was appellant's appeal from the order of judgment appealed from taken in time?

The judgment provided that the plaintiff should pay the money within twenty days "after written notice" of the entry of the judgment. It is not contended by respondent that he gave plaintiff any formal written notice of the judgment; but on June 28, 1897, he served on appellant's attorney a notice of a motion for a new trial in which the rendering of the judgment was noticed by way of recital. And the money was not paid within twenty days after that time. There is no question here of the sufficiency of a statutory notice, nor was the mere actual knowledge of appellant of the rendition of the judgment material. The question arose out of the express terms of the judgment, which required "written notice of the entry of this judgment." We think, therefore, that as appellant's right in the premises depended upon the commencement of the running of a certain period of time mentioned in the judgment, and as her title was to be forfeited unless a certain act was done within that period of time, she was entitled to a notice expressly intended for the purpose of starting the period of time mentioned in the judgment, and that a mere incidental recital in a notice of a motion for a new trial, given for an entirely different purpose, was not a sufficient compliance with the terms of the judgment.

We also think that the order of October 6th, entered on that day in the judgment-book, by which it was "ordered and adjudged that the plaintiff's action be and the same is hereby dismissed, and that plaintiff be and she hereby is barred from all equity of redemption or other right to the property set forth and described in said judgment," was and is as against appellant a final judgment, and that she had six months from its date in which to appeal therefrom. The motion to dismiss the appeal is denied.

The said judgment entered on the sixth day of October, 1897, is reversed and the cause remanded.

Temple, J., and Henshaw, J., concurred.

[L. A. No. 592. Department Two.—December 22, 1899.]

CHARLES GOODALL et al., Appellants, v. R. E. JACK,
Respondent.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—STATUTE OF LIMITATIONS—RENEWAL OF NOTES.—The running of the statute of limitations in favor of the stockholders of a corporation upon their statutory liability to the creditors of the corporation cannot be interrupted by a renewal of the debt under which the liability was created, by taking up old notes of the corporation evidencing such liability, and giving new notes in lieu thereof.

ID.—SUPPORT OF FINDING AS TO RENEWAL OF NOTES—NOMINAL INTERVENTION OF THIRD PARTY.—A finding that the new notes of the corporation were a renewal of the old notes is supported by evidence showing that, throughout the transaction, the negotiations for the taking up of the old notes to the plaintiffs, and the substitution of the new notes, were had between the corporation and the plaintiffs, and that the notes were made to a nominal third party who indorsed them to plaintiffs, and whose name was used under an arrangement for the exchange of checks, to give an appearance of payment of the old notes, no money having been really advanced by such third party or paid to the plaintiffs.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

George W. Towle, Jr., and Wilcoxon & Bouldin, for Appellants.

C. W. Goodchild, and W. H. Spencer, for Respondent.

THE COURT.—The defendant Jack was, during the times mentioned in the complaint, a stockholder of a corporation called the West Coast Land Company, and this action is brought to recover the proportionate share of defendant as such stockholder of a debt of the corporation alleged to have been incurred to one J. N. Knowles for money borrowed from him by the corporation on the fifteenth day of May, 1894. In his answer the defendant pleads, among other things, that the alleged cause of action is barred by the pro-

visions of subdivision 1 of section 338 and section 359 of the Code of Civil Procedure. Judgment went in the court below for the defendant, and plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The court found, among other things, that the alleged cause of action was barred by the provisions of the code above mentioned; and the only point discussed by counsel is whether or not that finding was correct.

It appears from the evidence that in May, 1890, the corporation above mentioned incurred an indebtedness to the plaintiff herein of a sum of money amounting to nearly two hundred thousand dollars, for which it gave the plaintiffs four promissory notes for different sums amounting in the aggregate to said sum of about two hundred thousand dollars. Four years afterward—on or about the fifteenth day of May, 1894—the board of directors passed a resolution authorizing the president and secretary to make notes of the corporation, payable to plaintiffs in the amount of the old notes, with interest, upon the surrender of the old notes, or, up the receipt of the face value of the new notes from “any other person,” then to make the new notes to such other person, and “to immediately apply all sums so received from said new notes in payment of said old notes.” The old notes, with interest, then amounted to two hundred and nineteen thousand two hundred and thirteen dollars and sixty-two cents. On said fifteen day of May, 1894, one of the plaintiffs brought to the secretary of the corporation a check of J. N. Knowles upon the Anglo-California Bank, Limited, for the said sum of two hundred and nineteen thousand two hundred and thirteen dollars and sixty-two cents, and the plaintiff delivered up to the secretary all the old notes to be canceled. The check of Knowles was immediately indorsed by the secretary to plaintiffs; and notes for the said amount were made payable to Knowles, which notes were on the same day indorsed by Knowles to the plaintiffs, and the check of Knowles was deposited by plaintiffs to their credit with the First National Bank of San Francisco. Knowles seems to have had good financial standing with the Anglo-California Bank, although when he drew the check on the 15th there was a balance due him on his account with the

bank of only about twelve hundred dollars. But on the next day—the 16th—he gave to the bank his note for the amount of the check, and the amount of his note was placed to his credit. On the next day he received a check from plaintiffs for two hundred and nineteen thousand two hundred and eighty-six dollars and sixty-nine cents, and took up his note by checking against his account. In the whole transaction the negotiations were between the plaintiffs and the corporation, and the latter knew nothing of Knowles in the business, except only that the check was signed by him and the new notes were made payable to him.

From the foregoing facts it is apparent that the court was warranted in finding that the transactions above mentioned constituted merely a renewal of the old debt by taking up the old notes and giving new ones in lieu thereof. But the running of the statute of limitations in favor of the stockholders could not in this way be interrupted. The suit was not brought until seven years after the time when the original liability was created. (Code Civ. Proc., sec. 359; *Bank v. Pacific etc. Co.*, 103 Cal. 594; *Redington v. Cornwell*, 90 Cal. 63; *Winona Wagon Co. v. Bull*, 108 Cal. 1.) These views make it unnecessary to discuss other questions—as, for instance, what the respondent's rights would have been if Knowles had really advanced the money to the corporation upon the credit of its notes to him, and the money thus advanced had been actually used by the corporations to pay off the old notes which were evidences of the original liability created in 1890.

The judgment and order appealed from are affirmed.

[Sac. No. 459. In Bank.—December 22, 1899.]

**B. F. PORTER, Respondent, v. LASSEN COUNTY LAND
AND CATTLE COMPANY et al., Appellants.**

**CORPORATIONS—VACANCY IN BOARD OF DIRECTORS—CORPORATE ACT BY
MAJORITY OF FULL BOARD—VALIDITY OF MORTGAGE.**—Notwithstanding a vacancy in the board of directors of a corporation organized under the laws of this state, it seems that a vote of a majority of the full board is valid as a corporate act to sanction the execution of a mortgage upon property conveyed to the corporation by the mortgagee.

ID.—RATIFICATION OF MORTGAGE BY FULL BOARD.—The subsequent action of a full board requiring the mortgagee to make additional advances on the security of his mortgage, and recognizing its validity in a resolution authorizing a second mortgage upon the property, is a full ratification of the first mortgage.

ID.—PLEADING OF MORTGAGE BY CORPORATION—PROOF OF RATIFICATION.—Where a mortgage executed by the corporation is pleaded, proof of a subsequent ratification is as pertinent to support the allegation as proof of a prior authorization.

ID.—INCOMPETENCY OF ONE DIRECTOR TO ACT.—The incompetency of one director to act, by reason of his interest in the transactions leading to the conveyance of the property to the corporation, and to the execution of the mortgage by the corporation, cannot affect the validity of the original authorization of the mortgage by a majority of the full board of directors to which his vote was not necessary, nor affect the subsequent ratification of the mortgage by a newly elected full board of directors, of which he was a member.

ID.—SECURITY FOR ADVANCES—DEMAND AND REFUSAL—FRAUD.—Where the mortgagee did not bind himself by the terms of the mortgage to make further advances which were provided for therein, excepting such advances within a specified limit as might be required to compromise any hostile claim to the mortgaged property, when requested so to do by the corporation, a mere demand by the corporation for further advances without reference to such a compromise, and a refusal to make the advances demanded, does not show any fraud committed by the mortgagee upon the corporation.

ID.—PLEADING—VARIANCE—EXCLUSION OF EVIDENCE.—Where the answer alleged merely a demand by the corporation for further advances, and a refusal by the mortgagee to make any further advances, an offer to prove a demand for an advance to carry out a compromise of a hostile claim is properly refused, and evidence thereof properly excluded, upon the ground that it had not been pleaded.

ID.—REFUSAL TO MAKE PROMISED ADVANCES—RECOUPMENT—PLEADING.

—The refusal of the mortgagee to make promised advances cannot render the mortgage wholly void and incapable of enforcement; but the mortgagor, in such case, can only recoup the actual damage shown to have resulted from the breach of that stipulation in the contract, under a pleading justifying such recoupment.

ID.—APPLICATION OF ADVANCES.—The mortgagee is not bound to see that advances made by him to be expended in the care and preservation of the mortgaged property are so expended by a representative of the corporation to whom the advances are properly paid.**ID.—CONSIDERATION OF MORTGAGE—ADVANCES INURING TO BENEFIT OF CORPORATIONS.—**A mortgage executed to secure advances made by the mortgagee for the care and preservation of the property of the corporation, and of trust property which inured to its benefit, and which was conveyed to it by the mortgagee, has a sufficient consideration for its support.**ID.—AGREEMENT WITH OWNER OF STOCK PERSONALLY—CONVEYANCE OF TRUST PROPERTY—CORPORATE PROPERTY—ASSUMPTION OF LIABILITIES BY CORPORATION.—**The consideration of the mortgage is not affected by the facts that the mortgagee became trustee of lands conveyed to him as security for advances thereupon under a personal contract made with the owner of nearly all of the stock of the corporation, who was then acting in his own name, but for the benefit of the corporation (the corporation being then dormant), and that such owner assumed to convey to said trustee as security the property which then belonged to the corporation, and that such property, together with the other property held in trust, was conveyed by the trustee to the corporation, after assumption by it of all the acts and liabilities of the owner of such stock, without dispute as to their correctness.

APPEAL from a judgment of the Superior Court of Lassen County and from an order denying a new trial. F. A. Kelly, Judge.

The facts are stated in the opinion of the court.

Spencer & Raker, and J. S. Spilman, for Appellants.

A. E. Bolton, for Respondent.

BEATTY, C. J.—This is an action to foreclose a mortgage alleged to have been executed by the corporation defendant. The findings and judgment of the superior court were in favor of the plaintiff, and the defendants appeal

from an order overruling their motion for a new trial. The main controversy in the case is in regard to the execution of the note and mortgage, and in support of their appeal the defendants contend that the decision of the superior court holding that the note and mortgage were duly executed is not only contrary to the evidence, but is against law, because it appears by the findings of the court, as well as by the uncontradicted evidence, that the resolution of the directors of the corporation purporting to authorize the mortgage was passed at a time when there was a vacancy in the board reducing the number of directors from five to four. The entire contention of the appellants upon this point is based upon the proposition that a single vacancy in the board of directors renders it impossible for the remaining members to bind the corporation by their unanimous vote, however regular their proceedings may be in other respects. They further contend that even if it should be held that a board of four directors was competent to act, the mortgage in question was invalid because given to secure the personal obligation of one of the four directors who voted for the resolution authorizing its execution. Some of their other principal contentions are that there was a lack of failure of consideration for the note which the mortgage was given to secure, and that the plaintiff induced the execution of the mortgage by making a promise which he never performed and never intended to perform, viz., that he would make further advances to the corporation to the extent of thirty thousand dollars.

All these propositions are contested by respondent, and, with respect to the execution of the mortgage, he contends that even if its execution was not originally authorized by a competent board it was nevertheless rendered valid by the subsequent ratification of a full board, and that, independent of such ratification, the corporation is estopped to deny its validity.

For the purpose of considering these and other grounds of the appeal it will be convenient to state in a general way the principal facts disclosed by the evidence.

The articles of incorporation of the Lassen County Land and Cattle Company are not contained in the record, but from the minutes of its proceedings it appears to have been organized at some time prior to the year 1885, and to have

adopted by-laws declaring that the corporate powers of the company should be exercised by a president, vice-president, and board of five directors, including the president and vice-president, of whom a majority should constitute a quorum for the transaction of business. The capital stock of the company was divided into one hundred thousand share, of which twenty-nine thousand six hundred and twenty-four shares remained unissued. Of the issued stock sixty-nine thousand seven hundred and ninety-five shares were held by C. A. Merrill, and five hundred and eighty-one shares stood in the names of other persons. It is very evident, not only from the distribution of the stock of the company, but from all the facts in the case, that Merrill and the corporation were substantially identical—the corporation, in other words, was a form under which Merrill transacted business. The property of the company (or of Merrill) consisted of lands, water rights, ditches, flumes, a sawmill, etc., of which Merrill appears to have had the control and management, either as president of the company or in his own right—it is not very clear or very important which. In January, 1885, when we get a first view of its affairs, the company seems to have been in lack of funds to carry on its ordinary business or care for its property, and after several meetings of its directors, at which these matters were fully discussed, it was finally resolved at a meeting held on the 5th of February, 1885, to close its office at 324 Pine street, San Francisco. Merrill, its president, was directed to sell the office furniture and to take charge of the proceeds, and he agreed to assume all responsibility for rent and other expenses in connection with the company's business. The minutes of this meeting were then written up, read, approved, and signed by the secretary and directors present. It is not stated that the board then adjourned sine die, but such seems to have been the case, for it does not appear that they ever met again until the twenty-eighth day of April, 1889, at which date Merrill presented a report of what he had been doing in the meantime. By this report he showed that he had expended in the management and improvement of the company's property about two thousand seven hundred dollars, borrowed in his own name from B. F. Porter, the plaintiff herein. To secure this indebtedness he had conveyed to Porter all the

property which he had formerly conveyed to the corporation. At the same time he entered into a written contract with Porter, a copy of which was attached to the report, by which Porter agreed to purchase other lands for Merrill's benefit, and upon repayment of all his advances, with interest, to convey to Merrill such additional lands, together with the property then conveyed to him by Merrill. All these things Merrill reported that he had done in his own name, but in the interest and for the benefit of the corporation. He reported, further, that Porter, in pursuance of the contract, had purchased four thousand four hundred acres of land and had advanced about thirty-five thousand dollars. The report of Merrill upon these matters was approved and his agreement with Porter (somewhat modified) was ratified and adopted by unanimous vote of the three directors present, but, as Merrill himself was one of the three, this attempt to ratify was clearly a failure. Afterward, however, on October 17, 1891, there was a meeting of the stockholders at which a full board of directors was elected, by whom a president and other officers were chosen; and, having thus effected a thorough reorganization, the Porter transaction was again taken up, and negotiations were resumed for the purpose of securing a conveyance from him to the corporation of the property conveyed to him by Merrill, and the additional property purchased by him under his contract with Merrill. Pending these negotiations, at a meeting of the directors of the company November 30, 1892, one of the directors resigned, but that fact was not communicated to Porter. Several other meetings of the directors were held without filling the vacancy in the board, and finally at a meeting held January 20, 1893, at which, according to the minutes, there were present four directors, including Merrill, the president, a preamble and resolution were unanimously adopted, wherein it was recited that the corporation was indebted to Benjamin F. Porter in the sum of sixty-five thousand eight hundred and twenty dollars and sixty cents, being the amount paid out and expended by said Porter in the development, improvement, and acquisition of title to the lands and property of this corporation in Lassen county; that the legal title to said property was vested in said Porter; that it was deemed

advisable by the board to have the legal title vested in the corporation, and payment of the sums due to Porter secured by note and mortgage, etc.; wherefore, it was resolved that Porter be requested to convey said lands, etc., to the corporation, and that the corporation execute its note for said amount and a mortgage of all said property to Porter. The preamble and resolution are set out at great length in the minutes; they give the precise terms of the note and mortgage which the president and secretary were authorized and directed to make and deliver in behalf of the company, including a full and particular description of the property to be conveyed to the company and mortgaged back to Porter. In this list of property was contained a large amount of land which the corporation had never before had any claim to, except such claim as arose out of the contract between Merrill and Porter above mentioned, and also the land, water rights, etc., which had been conveyed by Merrill to Porter at the date of that contract, and which, it seems, had been previously conveyed by Merrill to the corporation. Upon the adoption of this resolution a copy was handed to Porter, with the following certificate attached:

"I, R. J. Creighton, secretary of the Lassen County Land and Cattle Company, do hereby certify the foregoing to be a full, true, and correct copy of a resolution of the board of directors of said Lassen County Land and Cattle Company adopted at a special meeting of the board of directors, held at the office of the company, pursuant to due notice, a full board being present, on the twenty-eighth day of January, 1893, and that the mortgage hereunto annexed and note therein recited are full, true, and correct copies of the note and mortgage in said resolution referred to, and the said mortgage hereunto annexed is the original mortgage, the execution of which is therein and thereby authorized.

"[Corporate Seal] ROBERT J. CREIGHTON,
"Secretary of the Lassen County Land and Cattle Company."

This certificate of the regularity of the proceedings of the directors was required by Porter before he would consummate the transaction, and, upon receiving it, and in reliance upon it, he executed the conveyance as requested, and the

president and secretary at the same time executed and delivered to him a note and mortgage, duly acknowledged, in the precise form prescribed by the resolution of the board of directors. Thereupon the corporation entered into the possession of all the property in question, and so continued down to the trial of this action. Not only did the corporation take over from plaintiff all the real estate included in his conveyance, to a large portion of which it had no previous claim, and upon all of which he had made large expenditures under his agreement with Merrill above mentioned, but, after the vacancy in the board had been filled, the directors, from time to time, demanded additional advances on the security of the mortgage, and such advances were made by the plaintiff, who also paid taxes assessed to and payable by the corporation on the mortgaged premises. Said full board of directors also authorized a second mortgage of the same property to a third party, and in their resolutions expressly recognized plaintiff's mortgage as a valid and subsisting lien, and they have always claimed and retained possession of the property conveyed by Porter, together with all the advantages of his large expenditures for its care and preservation.

With this preliminary statement of the principal facts of the case we may proceed to consider the questions discussed in the briefs:

1. Can a corporation perform corporate acts such as the mortgaging of its real property while there is a vacancy in its board of directors? Section 305 of the Civil Code provides that the corporate powers, business, and property of all corporations must be exercised, conducted, and controlled by a board of not less than five nor more than eleven directors, and that whenever a vacancy occurs in the office of director, unless the by-laws of the corporation otherwise provide, such vacancy must be filled by an appointee of the board. Section 308 provides that a majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is a valid corporate act. Section 290 provides that the articles by which the corporation is formed shall set forth, among other things, the number of its directors or trustees, which shall not be less than five nor more than eleven. The by-laws of this corporation,

and, I suppose, its articles of incorporation, provided for a board of five directors, and the question is whether, during a vacancy in one of these directorships, the four remaining directors could lawfully assemble for the transaction of any business except the filling of such vacancy.

Counsel have not cited any case decided in this state or any other of the United States in which this question has been directly decided. In England, under a statute which is somewhat different from ours, it has been held in several cases that a corporation cannot enforce a forfeiture of shares for non-payment of a call by a board reduced by vacancies below the minimum number of directors prescribed by the deed of incorporation. (*Bottomley's Case*, L. R. 16 Ch. Div. 681, and cases therein cited.) These cases may, however, be distinguished from the case under consideration upon two grounds: In the first place the English statute differs from ours in an important particular. It does not require, as ours does (Civ. Code, sec. 290), the deed or articles of incorporation to specify exactly the number of directors who are to manage the corporate business, but permits the incorporators to designate a maximum and minimum number who may act; the shareholders, that is to say, either by the deed of incorporation or by subsequent resolution, may declare that the corporate business shall be conducted by a board of not more, for instance, than seven, nor less than five. Such was the *Bottomley* case, and the board of directors had been reduced by resignations and bankruptcy to four members. It was held that the remaining four directors could not make a call upon the shareholders or enforce it by a forfeiture of the shares. Sir George Jessel, however, in order to reconcile his decision with previous decisions of the English courts, was obliged to make a distinction between the case in which there was a maximum and minimum number of directors prescribed by the deed of incorporation, and one in which there was a mere number of directors stated, with power in a lesser number to act, and in this connection he says: "When the mere number of directors is stated, and then there are provisions showing that the directors are to meet during vacancies to fill up the number, and that they may transact business with a less number and

so on, it is obviously meant that the larger number shall be the number of directors as the normal number, but not that the business shall not be carried on with a less number; but that has no application when you find a clause that the number shall never be less than a certain number."

This passage from the opinion (which is followed by more in the same line of argument, with various illustrations, pages 688, 689) is really and in effect a construction of our statute adverse to the contention of appellants, for section 305 of the Civil Code, in declaring that the corporate powers, etc., must be exercised by a board of not less than five nor more than eleven directors, adds nothing to the effect of section 290, which requires the articles of incorporation to state the number of directors of the corporation. All the provisions of the statute taken together mean this, and nothing more, that each corporation must have a fixed and definite number of directors, not less than five nor more than eleven in number, of whom a majority shall constitute a quorum for the transaction of business. The decision in *Bottomley's Case*, *supra*, therefore, so far from being an authority for the proposition that a California corporation cannot transact business pending a vacancy in the board of directors, is more nearly an authority against it.

Another distinction between that case with the whole line of decisions upon which it is based, and the case before us, is that they all relate exclusively to attempts to forfeit shares for nonpayment of calls. It is no doubt true that directors owe to their constituents the duty of keeping the board full by promptly filling vacancies as they occur, and this for the reason that the shareholders are entitled to the benefit of the experience and advice of all the members of a full board in the transaction of its business. When the directors violate this duty, there may be sound reasons for holding that they should not be allowed to take any advantage as against the shareholders of acts or resolutions passed when a full board was not in existence. But when the corporation is dealing with a stranger who, acting in good faith and in ignorance of the existence of a vacancy in the board of directors, parts with his property on the faith of what he is induced to believe is a valid corporate obligation, the case is certainly very different in its substantial merits, if not in point of strict law.

Appellant cites the case of *Moore v. Rector, etc.*, 4 Abb. N. C. 51, as a case directly in point, but it is not in point. There was an attempt to mortgage a church by the rector, one of the wardens, and four vestrymen. The act under which the church was incorporated required an annual election of eight vestrymen as an essential part of the board of trustees, and declared that no board should be competent to transact business without the presence of a majority of the vestrymen. It was contended that since there were three vacancies in the vestry, four were a majority, but the court, construing the act, held that it meant a majority of the full vestry. Our statute requiring a majority of the trustees to form a quorum should receive the same construction, but in this case four directors were present, more than a majority of a full board, and the resolution to mortgage was adopted by a unanimous vote of the four. Respondent, as bearing on this point, cites several cases in which the courts of New York and Pennsylvania have held valid the election of boards of directors or trustees of corporations less in number than the charters prescribed, and since these decisions necessarily involved the assumption that such boards, though curtailed in number, could carry on the corporation business, they are pretty direct authority to the effect that a board of directors is competent to act notwithstanding an existing vacancy. (See *Matter of Union Ins. Co.*, 22 Wend. 599; *Wright v. Commonwealth*, 109 Pa. St. 560.) In the latter case it is said: "The power of a board is never suspended by vacancies unless the number be reduced below a quorum."

It is not necessary to go to this extent in the present case. It would be sufficient, in order to sustain the validity of this mortgage, to say that the votes of a majority of a full board may authorize a corporate act, although there may be a vacancy in the board. I am of the opinion that this is a sound proposition, but it is not even necessary, though entirely proper, to decide the point here; for, conceding that there was a lack of power in the board of directors as constituted on the twenty-eighth day of January, 1893, to mortgage the company's property there was no such lack of power at subsequent meetings of full boards at which the plaintiff was required to make additional advances on the security of his mortgage, and when a second mortgage was directed by a

resolution distinctly and expressly recognizing the existence and validity of plaintiff's mortgage. This was, in my opinion, a full ratification of the mortgage, and made it valid, if it was not valid at the date of its execution. Appellant cites section 2310 of the Civil Code against this conclusion, but it does not sustain him. The manner of directing the execution of a corporation mortgage is by resolution of the board of directors, and here by resolution of the board the mortgage is recognized as valid and its benefits claimed in behalf of the corporation. It is not necessary, in order to ratify, to do so in express and formal terms. Anything is sufficient which clearly and necessarily implies a recognition of the obligation.

It is objected that ratification was not pleaded. It was not necessary. A mortgage executed by the corporation was pleaded, and to support the allegation of a mortgage proof of a subsequent ratification was just as pertinent as proof of a prior authorization.

2. Another objection of appellant to the validity of the mortgage is based upon the fact that Merrill participated in the meeting of directors at which it was authorized and voted in favor of the resolution. It is contended that he could not transfer his personal obligation to the company. Considering that Merrill was, as we have seen, practically the whole corporation, this objection has not much substantial merit, but since there were a few shares of stock held by other persons it must be considered. And it is not disposed of like the last objection by what was done in subsequent meetings of the directors, when all vacancies in the board had been filled; for Merrill continued to be director and president and took part in those subsequent meetings. But in the first meeting three directors—a majority of a full board, exclusive of Merrill—voted for the mortgage, and in the subsequent meetings four members, exclusive of Merrill, voted for the resolutions recognizing its existence. The adoption of none of these resolutions depended on Merrill's vote. The votes of the other three directors were sufficient to bind the corporation, and his own vote, while expressing his assent to the arrangement, and binding him so far, had no effect in invalidating a resolution good without it.

3. Appellant contends that the mortgage was rendered invalid by the alleged fraud of plaintiff in procuring its execution by a promise to advance thirty thousand dollars in addition to the sums previously advanced, a promise which he has never performed and never intended to perform. The superior court finds that no such promise was made, but this finding is assailed as contrary to the evidence. The evidence cited against it consists altogether of two clauses contained in the mortgage, as follows: "And also to secure the repayment to said party of the second part of such further advances as may be made by him to or for the use and benefit of the party of the first part, and authorized or requested by it by resolution of its board of directors, not exceeding the further sum of thirty thousand dollars, exclusive of interest, over and above the amount of said above recited promissory note, and all such further advances shall be deemed to be due and payable to the party of the second part at the maturity of said promissory note, and shall bear interest at the same rate. . .

"If at any time during the existence of this mortgage there shall be made or asserted any claim against the lands and premises herein described, or any part thereof, or if any suit or action therefor or affecting the same or any part thereof shall be commenced or threatened, the party of the second part hereby agrees that he will, and he shall have the power, and is hereby authorized to settle and compromise the same upon such terms as may be authorized by the party of the first part, and that the moneys paid in such settlement or compromise, and for all expenses and counsel fees, shall be repaid to the mortgagees and his assigns by the party of the first part, and shall be a lien upon said lands," etc.

It is perfectly clear that the plaintiff did not promise or bind himself in either of these clauses of the mortgage to make a further advance of thirty thousand dollars upon the mere demand of the corporation. The utmost that can be claimed is that he agreed to advance such sum, within the limit of thirty thousand dollars, as might be required to compromise any hostile claim to the mortgaged property, when duly requested so to do by the corporation. Conceding that he made such agreement, the corporation would have no ground for complaint unless it appeared that he had refused

to advance money to carry out a compromise of a conflicting claim which had been regularly approved by its board of directors. But this is not alleged. All that is said with reference to this matter in the answer filed by the corporation is that the directors had, before the commencement of the action, demanded a further advance of thirty thousand dollars, and that plaintiff had refused to advance the same or any part thereof. It is true that at the trial the defendants made an offer to prove that the corporation had demanded an advance of nine thousand dollars to carry out a compromise approved by them of a hostile claim asserted by one Marker, but this evidence was properly excluded upon the objection of the plaintiff that such matter had not been pleaded. It does not appear, therefore, that the plaintiff violated any agreement contained in the mortgage. But even if it had been alleged and proved that he did refuse to advance money required to carry out a compromise duly approved by the directors of the corporation, the result would not have been to render the mortgage wholly invalid and incapable of enforcement. In the absence of any rescission or attempt to rescind, the defendant would only have been entitled to recoup for the damages caused by the breach of this stipulation of the contract, and it is nowhere alleged or shown that the corporation sustained any damage by the failure to compromise the Marker claim.

There was evidence admitted in the course of the trial showing that plaintiff, prior to the execution of the mortgage, had promised to advance to Merrill three thousand dollars to be expended in the care and preservation of the mortgaged property, and the court finds upon sufficient evidence that fully that sum was so advanced to Merrill, or upon his order. An attempt was made to show that a considerable portion of it was used for purposes foreign to the business of the corporation. But the plaintiff's promise was only that he would advance the money to Merrill, and it was Merrill's business to see that it was properly applied. As to this matter I cannot see that the corporation has any ground of complaint, either technical or substantial.

4. The claim that there was a lack or failure of consideration for the mortgage rests upon the fact that Merrill had

conveyed to the corporation a portion of the property subsequently conveyed by him to plaintiff, and by plaintiff conveyed to the corporation at the date of the mortgage. Appellant argues that since the conveyance by plaintiff was the consideration of the note, and since a large portion of the property which plaintiff assumed to convey was already the property of the corporation, there was, to the extent of the value of such property, no consideration. Here, again, the whole substance of appellant's complaint rests upon the ability of Merrill, the individual, to distinguish himself from Merrill, the corporation. But the objection is easily answered in its technical aspect. The consideration of the mortgage was not the land which plaintiff conveyed or assumed to convey, but the money he had advanced for the care and preservation of property belonging to the corporation and the acquisition of other property, which he had purchased for Merrill under a contract of which the corporation desired to have the benefits. In all these matters Merrill had been acting in his own name, but for the benefit of the corporation during the long period when it lay dormant, from 1885 to 1889. When it came to life again and began to act in its corporate capacity it simply assumed Merrill's obligations incurred in the preservation of its property and the protection of its interests, at the same time appropriating to itself the benefits of what he had bargained for in his own name. As to the amount of plaintiff's advances and the extent of Merrill's obligations thus assumed by the corporation, there is no question—his accounts were submitted to Merrill and the other directors and their correctness was never disputed.

5. Appellants present a number of minor points in their brief relating to rulings of the superior court upon objections to evidence, but they all depend upon the propositions above discussed, and fall with them. At least it may be said that none of the rulings complained of could have been substantially injurious to the defendants, even if some of them may have been technically erroneous.

The order appeal from is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J., Temple, J., McFarland, J., and Henshaw, J., concurred.

[Sac. No. 537. In Bank.—December 22, 1899.]

In the Matter of the Estate of CHARLES H. HUELSMAN,
Deceased. L. B. MOHR et al., Executors, Appellants, v.
CATHERINE HUELSMAN, Respondent.

ESTATES OF DECEASED PERSONS—ORDER SETTING APART HOMESTEAD ABSOLUTELY—SEPARATE PROPERTY OF HUSBAND—TITLE OF WIDOW.—An order setting apart to the widow, in general and absolute terms, the whole of a farm as a homestead, which was in fact the separate property of the deceased husband, without limiting the homestead to a life estate, is erroneous, but not void; and, if the time for appeal from the order has expired without appeal, the title to the homestead under the order is vested in the widow in fee.

ID.—SPECIFIC DEVISE—POWER OF COURT.—The fact that the property set apart to the widow as a homestead was specifically devised, one-half to the widow, and the other half to two children, cannot affect the power of the court to set it apart as a probate homestead, which is paramount to the power of the testator to devise his estate.

ID.—ENCUMBRANCE UPON PROBATE HOMESTEAD—DISCHARGE BY EXECUTORS—POWER OF COURT.—The court has no power to order the executors to discharge the encumbrance of a mortgage upon the probate homestead, the title to which is vested in fee in the widow, where no claim for the debt has been presented against the estate, and the recourse of the mortgagor is limited solely to the mortgaged property so set apart in fee.

ID.—CONSTRUCTION OF CODE—ENCUMBRANCES UPON DECLARED HOMESTEADS.—Section 1475 of the Code of Civil Procedure, making provision for the extinguishment of liens and encumbrances upon homesteads, is limited exclusively to homesteads declared during the lifetime of the spouses, and can have no application to probate homesteads, in respect to which there is no corresponding provision in the code.

ID.—EXEMPTION OF SPECIFIC DEVISES—TITLE OF WIDOW UNDER HOMESTEAD ORDER.—The title of the widow being under the homestead order in fee, and not under the devise, she cannot take advantage of the provisions of sections 1544 and 1563 of the Code of Civil Procedure, exempting specific devises from the payment of the debts of the estate.

APPEAL from an order of the Superior Court of Sacramento County directing executors to discharge a mortgage lien upon a probate homestead. Matt. F. Johnson, Judge.

The main facts are stated in the opinion of the court, and in the concurring opinion of Mr. Justice Garoutte, as to the general character of the proceedings setting apart the homestead, and the absence of allusion in the terms of that order to the separate property of the husband. The order appealed from recited that the whole property of the estate, including the homestead, was in fact the separate property of the husband, and construed the order setting apart the homestead as limited to a life estate.

Holl & Dunn, for Appellants.

A. J. Bruner, and Bruner & Bros., for Respondent.

HENSHAW, J.—This is an appeal from an order directing the executors of the above-entitled estate to pay off and discharge a mortgage lien on the probate homestead which had been set apart to the widow of the deceased.

The deceased left a will which he devised to his widow a one-half interest in a farm in Sacramento county, and also a one-half interest in the personal property on the farm. The remainder of his estate, with a trifling exception, was left to a daughter and son, children of a former wife. At the time the will was made, the farm, which was appraised at the value of two thousand three hundred dollars, was unencumbered, but afterward it was mortgaged by the deceased to secure the payment of a thousand dollars. The entire estate was the separate property of the husband. Before the time for approving claims against the estate had expired the court, upon application of the widow, set aside the whole farm as a homestead. The order so setting aside the homestead did not limit it to a life estate in the widow, but set it aside to her absolutely. This, of course, was erroneous, but the time to appeal from the order having expired, and no appeal having been taken, and the order, though erroneous, not being void, title in fee under the order vested in the widow. (*In re Moore*, 96 Cal. 522; *Fealey v. Fealey*, 104 Cal. 354, 43 Am. St. Rep. 111; *Hanley v. Hanley*, 114 Cal. 690.) Despite the fact that the farm had been specifically devised, one-half to the widow, the other half to the two children, it was competent for the probate court to set it aside as a homestead, for the right of a testator to devise is

subordinate to the power of the probate court to sequester and set apart the property for the shelter, care, and support of the family. (*Sulzberger v. Sulzberger*, 50 Cal. 385; *In re Davis*, 69 Cal. 458; *Estate of Lahiff*, 86 Cal. 151.) Notwithstanding, then, the specific devise of one-half of the farm to the widow, her title to all of it is deraigned from the homestead order.

The owner of the debt secured by the mortgage upon the farm never presented his claim against the estate. His recourse was therefore limited to the mortgaged property. Code Civ. Proc., sec. 1500; *McGahey v. Forrest*, 109 Cal. 63.)

The question thus presented is that of the power of the court to order the executors to discharge an encumbrance upon the probate homestead. Since the widow's title comes from the homestead order, and not from the devise, she is not in a position to take advantage of the provisions of sections 1544 and 1563 of the Code of Civil Procedure relative to the exemption of specific devises from the payment of the debts of an estate. We have looked in vain to find any law authorizing the court to discharge liens upon such a homestead. Where a homestead has been selected and recorded prior to the death of one of the spouses, section 1475 of the Code of Civil Procedure makes provisions for the extinguishment of liens and encumbrances upon it, but section 1475 has to do exclusively with homesteads declared during the lifetime of the spouses. The law has not seen fit to make the same provision as to probate homesteads. Therefore, however, beneficent may be the power which the court exercised in making the order in question, we are constrained to hold that it was unauthorized.

. The order appealed from is reversed.

Temple, J., Van Dyke, J., and Harrison, J., concurred.

GAROUTTE, J., concurring—If it appeared upon the face of the proceedings setting aside this property as a homestead that it was the separate property of the husband, then the order here made setting aside the property in fee as a homestead would be void—at least, void as to any interest beyond a life estate. For the statute is the measure of the court's power in such a case, and the statute says the property may be set aside for a "limited period," and this court has

declared that such limited period may not exceed a term for life. Hence, an order would be void upon its face to the extent, at least, of anything beyond a life estate, which purported to set aside separate property as a homestead in fee. But here we find nothing in the record of the proceedings for setting apart the homestead showing this property to be separate property, and in support of the validity of the order made we are bound to assume to the contrary. In the case of a probate homestead upon separate property set aside for a limited period—for example, five years—I see no legal objection to the court making an order that the general assets of the estate be applied to the satisfaction of a mortgage resting upon it, exactly the same as if it had not been set aside as a homestead. The fact that it is a homestead for a limited period is merely incidental to the main question, and the interests of the estate in such property may be protected by the satisfaction of a mortgage resting upon it.

For the foregoing reasons I concur in the judgment.

[Crim. No. 568. Department Two.—December 23, 1899.]

THE PEOPLE, Respondent, v. A. H. CAMPBELL, Appellant.

CRIMINAL LAW—LARCENY—FALSE PRETENSES—TITLE—POSSESSION—SPECIAL PROPERTY—FELONIOUS INTENT.—It is essential to the crime of larceny that the title to the stolen property shall not have been parted with. If the title has been obtained by fraud or deceit, the crime is that of obtaining goods under false pretenses, and not larceny; but if the transfer be of possession merely, or of some special property by way of pledge or bailment, which has been secured by fraud, with a present felonious intent to convert the property so acquired, the offense is larceny.

Id.—SUFFICIENCY OF EVIDENCE—FRAUDULENT PERSONATION—PARTIAL LOAN—PRETENDED BAILMENT AND SECURITY.—Where the evidence showed that the money of the prosecuting witness was fraudulently obtained through a false personation by the defendant of membership in a responsible house which was represented as about to employ the prosecuting witness as a collector, and as requiring a deposit from him by way of security; and the jury might infer from the evidence that part of the money was obtained by way of loan, and that as to the residue the title remained in the prosecut-

ing witness, and the defendant was a mere bailee thereof, charged with the duty of depositing the funds, and taking a certificate of deposit in the name of the prosecuting witness, and that defendant intended when he acquired possession to convert the money to his own use, the crime of larceny was established as to the residue so obtained, and a verdict of conviction of larceny by the jury must be sustained.

1D.—CONSTRUCTION OF CODE—SPECIAL PROSECUTION.—Where the evidence is sufficient to establish the crime of larceny, the defendant may be prosecuted generally therefor, and need not be specially prosecuted either for the results of false personation under section 530 of the Penal Code, or for obtaining property by false pretenses, under section 532 of the same code, although the facts might admit of a prosecution under either of those sections.

APPEAL from a judgment of the Superior Court of Los Angeles County and from orders denying a new trial and denying a motion in arrest of judgment. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

W. H. Shinn, and S. V. Landt, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

HENSHAW, J.—Defendant was jointly charged with one Spencer with the crime of grand larceny, the information alleging merely that they “did willfully, unlawfully, and feloniously take, steal, and carry away” five hundred dollars, lawful money of the United States, the personal property of Fred Seagrave. The defendants obtained separate trials, and from the judgment which followed his conviction Campbell appeals. The facts disclosed upon the trial appear by the testimony of the complaining witness Seagrave, and are the following: Seagrave answered an advertisement in a Los Angeles paper, which read as follows. “Wanted, a young man of good habits to collect for a large firm. Must be able to drive, and give reference. State age and where last employed. Five hundred dollars security required. Cash or unencumbered real estate. Address M, Box 35, Times office.” He was called upon by Spencer, who represented himself to be an employee of the Patton-Davies Lumber and Fuel Com-

pany, a prominent business firm in Los Angeles, and was told that it was this firm which wished to employ a collector. He was taken by Spencer ostensibly to visit the office of the Patton-Davies Company. As they were about to enter the office Seagrave's companion said, "There is Mr. Davies now," and introduced him to the defendant Campbell, who personated Mr. Davies of the Patton-Davies Company. The result of the conversation was that the false Davies agreed to employ Seagrave as his collector. The next day they met and Seagrave accompanied Campbell in a ride about town, while the latter was attending, as he stated, to certain business matters. During the progress of the drive Campbell said: "Now, it will save time if you go round to the bank and draw the money," the money being the five hundred dollars called for in the advertisement, money which was to be held by the firm as security against possible embezzlements upon the part of their collector. Seagrave got the money. Campbell then said: "I have got a few bills I would like to settle, and it would save me much time. . . . Now, loan me the money to pay these debts in the Stimson block, and the balance I will put in and draw the balance out of the firm's money, and give you a certified check around at the First National Bank for five hundred dollars in your name." Elsewhere the witness Seagrave testifies as follows: "Q. Is it not true that you agreed with him that he was to use this money in his business, and he was to make a certificate of deposit for the full money which you delivered to him from his own funds? A. Yes, sir; I made an agreement; that is, it was agreed that he was to use the money just as you say, providing he returned the full amount on that same day. The agreement was that he could use the money and return it, yes, sir. Q. And there was no limit to the amount he was to use? A. No; there was no limit at all. Q. And you delivered to him the five hundred dollars under that agreement? A. Yes, sir; I gave him the money. Q. For their own use and their own business, as you have stated? A. Under that provision, yes, sir." Still further the witness testified: "'Well,' he says, 'now, if you can get that in cash, it will save me the trouble of going around there, and I can pay a couple of bills, and when we come round there [to the bank] we can stick in the balance and draw out enough to make up the de-

iciency, and put it in the bank in your name on the certificate of deposit.' Q. Did he say anything about what amount of bills he had to pay, or what they were? A. It was something like between twenty-five and fifty dollars, he said. Q. Why did you let him have five hundred dollars, if it was only twenty-five or fifty dollars that he had to pay? A. Now you ask me a question that I don't know myself, but I handed it to him; it was all rolled up together, and I simply handed it to him. Q. Did he not request you to deliver that money to him or let him have it to use to pay bills with, and then you were to go down to the First National Bank and get a certified check from the funds of the Davies Lumber Company? A. Yes, sir. Q. Yes, sir? A. Hold on now; let me answer your question there. I come to think of it, he demanded the five hundred dollars, and said about paying the bills and putting the balance, what he had left, in a certificate of deposit, and he would draw out enough of the company's funds to make up the balance of the deficiency. Q. Did he say how much you would have left, or anything about that? A. No, sir; he said that he had about twenty-five of fifty dollars to pay."

It is of the essence of the crime of larceny that the title to the property alleged to have been stolen shall not have been parted with. If one is induced by fraud or deceit to part with the title to personal property, the law recognizes such a crime as the obtaining of goods by false pretenses, and punishes it accordingly. But it is distinctly not larceny. Upon the other hand, where possession merely has been parted with, or where some special property in the goods, as by way of pledge or security, is transferred, if such special property and transfer be fraudulently secured with the present felonious intent to convert the property so acquired, the offense is recognized as larceny. (*People v. Raschke*, 73 Cal. 378; *People v. Johnson*, 91 Cal. 265.) As is said in *People v. Raschke*, *supra* "The most difficult phases of the question arise where a defendant charged with larceny has by false and fraudulent pretenses obtained possession of the property under the guise of a purchase and sale. It is clear that in such a case, where there has been a change both of the legal possession and the entire property of the owner in the thing delivered, there can be no larceny; otherwise where

there has been a change of possession, but no change of property." From the quotations which we have given from the testimony of Seagrave it is apparent that the jury could have found that of the five hundred dollars transferred to defendant not more than fifty dollars was a loan. As to the rest, the title remained in Seagrave, and the defendant was a mere bailee charged with the duty of depositing the funds and taking therefor a certificate of deposit in the name of Seagrave. It is this view of the evidence which the jury must have adopted, and, as no one will question but that there was sufficient shown to warrant a finding that it was the defendant's present intent at the time he acquired possession to convert the money to his own use, the crime of larceny was established. In this view the case is very similar to that of *People v. Tomlinson*, 102 Cal. 19.

But appellant objects that the offense proved by the evidence is exactly covered by sections 530 and 532 of the Penal Code, and that he should have been charged under one or another of these sections. There are offenses under these sections which are not larceny, and the mere fact that under the peculiar circumstances of this case the crime, while shown to be larceny, might have been punished under another provision of the Penal Code, did not make it obligatory upon the prosecution to charge under the one provision rather than the other. As is said in *People v. Frigerio*, 107 Cal. 152: "The fact that the circumstances disclosed are such that the defendant might have been charged with and convicted of larceny does not make the offense any less one of the special classes provided for in section 532 of the Penal Code, the circumstances being sufficient to bring the case within that section. Nor does it render defendant less amenable to a prosecution under the latter section."

The judgment appealed from is affirmed.

McFarland, J., and Temple, J., concurred.

[S. F. No. 1094. In Bank.—December 23, 1899.]

J. J. JOHNSON, Respondent, v. CALIFORNIA LUSTRAL
COMPANY, Appellant.

MINING CORPORATIONS—DISPOSITION OF "MINING GROUND"—RATIFICATION BY STOCKHOLDERS—CONSTRUCTION OF STATUTE.—The act of April 23, 1880, "for the further protection of stockholders in mining corporations," requiring that any disposition of its "mining ground" must be ratified by the holders of at least two-thirds of its stock, does not import that its "mining ground" shall be subject to mineral entry, or shall be valuable for mineral deposits in the sense of the federal statutes relating to public lands, but applies to any ground acquired by such corporation for mining purposes, and subjected by it in good faith to the ordinary process of mining with a view to utilize the product for commercial purposes, regardless of the chemical or geological character of the article mined, and regardless of whether the mining is at a profit or at a loss, or whether sound judgment would or would not approve of that use of the land.

ID.—MORTGAGE ON "PAINT-STONE" MINE—MEANING OF TERM "MINING GROUND."—A mortgage on ground owned and mined by a mining corporation, for rock called "lustral," or "paint-stone," which is worked by the ordinary process of mining and pulverizing in a mill, and the product sold to be used in the manufacture of paint, is a mortgage on "mining ground" within the meaning of the statute, and is not valid unless ratified by the holders of at least two-thirds of the capital stock.

ID.—STATUTE LIMITED TO "MINING GROUND."—The act of April 23, 1880, is limited in its operation to the "mining ground" of the mining corporation, and the appurtenances connected therewith, and does not apply to other real property of the corporation.

APPEAL from a judgment of the Superior Court of Napa County and from an order denying a new trial. E. D. Ham, Judge.

The facts are stated in the opinion of the court.

Fitzgerald & Abbott, Sam Bell McKee, and R. B. Myers,
for Appellant.

The statute applies to all mining corporations and all mining ground, regardless of the nature or results of the mining therein, or of the mineral substance mined, which may include salt, coal, paint-stone, or any substance which can be

got underneath the earth, for the purpose of profit. (*Hext v. Gill*, L. R. 7 Ch. App. 699, 712; *Gesner v. Gas Co.* 2 Allen (N. B.), 595; *Earl of Jersey v. Neath etc. Union*, L. R. 22 Q. B. Div. 555; *Midland Ry. Co. v. Haunchwood etc. Co.*, L. R. 20 Ch. Div. 552; *Loosemore v. Tiverton etc. Ry. Co.*, L. R. 22 Ch. Div. 25; *Midland Ry. Co. v. Miles*, L. R. 33 Ch. Div. 632; *Dixon v. Caledonian etc. Ry. Co.*, L. R. 5 App. Cas. 820; *Bell v. Wilson*, 1 Ch. App. 303.) "Paint-stone" may be conveyed under the terms "mines and minerals." (*Hartwell v. Camman*, 10 N. J. Eq. 128; 64 Am. Dec. 448.) "Mining ground" includes all appurtenances thereto. (*McShane v. Carter*, 80 Cal. 310.) The mortgage, being upon the mining ground of the corporation, is invalid, under the statute, because not ratified as required thereby. (*McShane v. Carter*, *supra*; *Pekin Min. Co. v. Kennedy*, 81 Cal. 363; *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629.)

E. M. Gibson, and Welles Whitmore, for Respondent.

The land in question was patented as agricultural land; and the finding of the court that it is agricultural land and has no value for mineral purposes is sustained by the evidence, which cannot be reviewed by this court.

BRITT, C.—Suit to foreclose a mortgage made by defendant to secure payment of its two promissory notes, each for the sum of five thousand two hundred and thirty-six dollars, besides interest. The property mortgaged is a tract of land owned by defendant containing about one hundred and four acres. The defense is founded on the act of the legislature entitled, "An act for the further protection of stockholders in mining companies," approved April 23, 1880 (Stats. 1880, p. 131); the first section whereof provides, among other things, that "it shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation. . . . unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation." The court below found that defendant is a mining corporation, and that said mortgage has never been ratified by the holders of its stock in accordance with the provisions of said statute. But the court further found that the land covered by the mortgage "was and is not mining

ground as specified by said statute, but was and is agricultural land." There was judgment for foreclosure as prayed by plaintiff.

The question most in dispute at the trial was upon the character of the mortgaged premises—whether "mining ground" within the meaning of said statute, or not. There was evidence without conflict that defendant bought the land for mining purposes, and engaged in the business of taking from a portion thereof, through a tunnel and sundry other excavations, certain rock which defendant called "lustral" or "paint-stone," pulverizing the same by means of machinery on the ground, and selling and attempting to sell the product thus obtained, which was to some extent used in the manufacture of paint, and was of some utility for that purpose. Defendant had a mill building on the premises, sixty by one hundred and forty feet in size, which was "pretty well filled," such was the testimony, with machinery for drying and crushing the rock. Such business was carried on at and prior to the time of the execution of said notes and mortgage. Some time afterward defendant ceased operations, and failed in its said business, the total sales of the product having been less than one thousand dollars. A witness produced as an expert testified for plaintiff that he considered said rock to be a common country formation; that it was not mineral bearing, though it had a very small percentage of mineral in it; that it was not valuable for mining ground. It appeared from his evidence, however, that the rock lies in strata and is different from other formations on the land; also that he considered mining ground to be such as produces mineral in paying quantities. He was asked: "If you mine rock from the earth, and you draw from that rock such mineral as produces paint or polish, don't you mine for that?" and replied, "That would be mining if the mineral was there in paying quantities." There was other evidence tending to show that the land was chiefly valuable for agricultural purposes.

The defense relied on is hardly conscionable under the circumstances appearing, and it is with reluctance that we conclude that the decision of the court respecting the character of the land, within the contemplation of the act of 1880, is contrary to the evidence. But the statute declares unlawful a

mortgage or other disposition by the directors of the whole or any part of the mining ground of a mining corporation, except upon the ratification of the holders of two-thirds of the stock, and it must be enforced according to its intent. Several instances of its application have occurred. (*McShane v. Carter*, 80 Cal. 310; *Pekin Min. Co. v. Kennedy*, 81 Cal. 356.) The question is upon the meaning of the terms "mining ground" employed in the statute. It has been suggested that these words should be understood as the equivalent of "lands valuable for minerals" and "valuable mineral deposits" in the statutes of the United States relating to the sale of those parts of the public domain so designated (U. S. Rev. Stats., secs. 2318, 2319); and hence that land cannot be considered mining ground under the aforesaid act of 1880 unless it is of such character that, had it been public land, it might have been located as a mining claim and purchased as such from the government. We think, however, that this understanding of the statute, if adopted, would lead us into bogs and fens of uncertainty respecting its interpretation. In the first place, the decisions of the officers of the federal land department show that some lands have been held subject to location as mineral under the federal laws which can scarcely be regarded as the subject of mining in the ordinary sense. Thus in *McGlenn v. Wienbroer*, 15 Land Dec. 370, the department ruled that public land, chiefly valuable for a peculiar building stone thereon, was subject to entry under the mining laws and not as agricultural land, although it was worked as a quarry only. And so of lands valuable only for deposits of marble. (*Marble Co. v. Railroad Co.*, 25 Land Dec. 233.) Other rulings of similar import might be cited. Unless we are prepared to admit that an ordinary open stone quarry constitutes "mining ground" as meant in our statute, then we could not accept these rulings as a guide. On the other hand, it is said to have been held by the department in *Green v. Grumbley*, decided May 20, 1896, that the presence of a thick vein of coal in public land does not render its character mineral when shown to be not susceptible of mining at a profit. (Clark's Mineral Law Digest, 346.) Also that bog iron is not a mineral. (Clark's Mineral Law Digest, 28.) And in *Etling v. Potter*, 17 Land Dec. 424, it was held that

the presence of gold in land does not characterize it as mineral unless it is in paying quantities. It seems to us that if a California mining corporation should own and mine a thick vein of coal it would be impossible not to hold the ground so used to be its "mining ground" within the act of 1880, whether the operations should prove profitable or not; and so of land which it might own and mine for gold, although the mining might result in loss. In one instance the commissioner ruled that only land containing metalliferous ores should be regarded as mineral, but this decision was reversed by the secretary of the interior, and it seems to be now established as the rule of the department that "lands chiefly valuable for mineral deposits, of whatever kind or nature, may be properly disposed of under the mining laws." (*Aldritt v. Railroad Co.* (Nov. 6, 1897), 25 Land Dec. 349; *Marble Co. v. Railroad Co.*, *supra*.)

Again, as we see the question whether "mining ground" means the same thing as land subject to mineral entry, it is set at rest by the decisions of this court. Thus, it is held that a lien given by statute upon "mining claims" cannot be extended to mines operated on land held under Mexican grant or agricultural patent. (*Morse v. De Ardo*, 107 Cal. 622; *Williams v. Miners' Assn.*, 66 Cal. 193.) Surely, however, lands of the latter class might constitute "mining ground." And in *Estate of Byrne*, 112 Cal. 176, 179, the foundation of the decision is that a mine or mining ground has no necessary identity whatever with mineral land patented as such by the United States. The case of *Ball v. Tolman*, 119 Cal. 358, arose under the statute imposing penalties on the directors of a mining corporation for omitting certain acts required of them in the course of the business (Stats. 1880, p. 134); one of the defenses set up was that the operations of the company—which ended in complete failure—were carried on in the bed of the Sacramento river and were not "mining"; the court said: "It is immaterial, if true, that the river bed where navigable was not subject to location as a mining claim; the company did mining there, or endeavored to do so, and expended money of the corporation in the effort, and the requirements of the law . . . cannot be evaded by showing that the company was wrongfully searching for gold in a navigable stream."

We suppose there can be no doubt that an actual mine—land subject to the processes of mining—is “mining ground” in the sense of the statute. What, then, is a mine, or what is mining? In *Rex v. Sedgley*, 2 Barn. & Adol. 65,, the question was whether certain property from which limestone was obtained, by means of tunneling and other excavations, to be used in smelting iron and in the manufacture of lime, constituted a mine. The court (per Lord Tenterden, C. J.) having adverted to an attempt by counsel to restrict the term “mine” to works for the extraction of metals, proceeded: “If the existence of metal be necessary to constitute a mine, salt works, from which salt is obtained in the way this stone was obtained, will not be mines, nor, indeed, will coal works be mines. . . . And to deny the character of a mine to the works in question would, as it appears to us, be to depart from the ordinary and proper meaning of that word in the English language.” In *Rex v. Brettell*, 3 Barn. & Adol. 424, the court held that similar works for obtaining fire-brick clay were a mine, saying: “In order to determine whether an excavation in the earth constitutes a mine or not we are to look to the mode in which the article is obtained, and not to its chemical or geological character.” In *Westmoreland Coal Co.’s Appeal*, 85 Pa. St. 344, it was held that as to coal a worked vein is a mine, and the court said: “By working the vein it becomes a mine.” In *Hartwell v. Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448, it was held that paint-stone found in strata below the surface of the soil, distinct from the ordinary earth, and worked by ordinary means of mining, will pass by the designation of “mines and minerals” in a deed. In *Ball v. Tolman*, *supra*, dredging the bed of a navigable river for gold—which operations yielded no returns whatever—was yet held to be mining, and among the reasons assigned for the decision was that the method adopted was among the modes of placer mining. In *Hines v. Miller*, 122 Cal. 517, it was held that one engaged in the construction of shafts, tunnels, and the like, for prospecting and developing a mine, is engaged in mining as much as he who extracts gravel or ore from the mine. Suppose the shafts and tunnels should fail to strike profitable ore or gravel (which was probably the fact in *Hines v. Miller*, as the action was to enforce liens for

unpaid labor done on the ground), would the operations be any the less "mining"? Or suppose some expert should testify that the ground explored was worthless for any purpose of profit, we think his opinion would hardly justify the conclusion that the ground was not in fact mined—assuming, of course, that the operations were prosecuted in good faith.

We do not hold that the inferences to be deduced from the authorities cited would control the decision of all questions which may arise concerning the proper definition of a mine or mining ground; for the phases in which such questions may occur are, perhaps, very varied; but we think it clear that when a mining corporation, in good faith, works by ordinary mining processes deposits of stone or other mineral on land owned by it with a view to utilizing the product for commercial purposes, the land thus worked and exploited is "mining ground" within the meaning of the act of 1880, whether the undertaking results in loss or profit, and whether sound judgment and discretion would approve that use of the land or not.

The expert testimony that the land mined is of no value as mining ground is of no consequence, for the reason, if none other, that in a case such as this it sets up a false standard, viz., that mining ground must be land bearing mineral in quantities which make it profitable for working—a test which would make the question dependent upon market demand for the product and the thousand varying contingencies of the cost of production.

There is no doubt on the evidence that some portions of the mortgaged land were actually mined by defendant with a view to profit, and as to those parts, together with the mill and other appurtenances (*McShane v. Carter, supra*), the prohibition of the statute clearly applied. Whether the tract outside the six or eight acres upon which the mining operations seem to have been directly prosecuted ought to be considered as also within the statute, if proved to be worthless for mining purposes and not necessary to the working of the other, is a question not raised by the record and which we do not decide. The act does not relate to the real property of such a corporation generally, but only to its mining ground. (*Granite Gold Min. Co. v. Maginness*, 118 Cal. 139.)

The judgment and order denying a new trial should be reversed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

Temple, J., Henshaw, J.,
Harrison, J., McFarland, J.,
Beatty, C. J.

[Sac. No. 244. In Bank.—December 23, 1899.]

J. B. RUGGLES, Respondent, v. W. J. CANNEDY and
BANK OF WINTERS, Appellants.

CHATTEL MORTGAGE—NECESSITY OF RECORD—INVALIDITY AS TO CREDITORS.—The record of a chattel mortgage upon personal property pursuant to section 2957 of the Civil Code is intended to take the place of the immediate delivery and continued change of possession of personal property required in other cases of transfer by section 3440 of that code; and if the mortgage is not acknowledged or proved, certified, and recorded as required by section 2957, it is void as to the creditors of the mortgagor.

ID.—PROMPT RECORD ESSENTIAL—INSOLVENCY OF MORTGAGOR—DELAYED RECORD—SUBSEQUENT CREDITORS—ACTION BY ASSIGNEE.—A prompt record of the chattel mortgage is essential in order to make it valid as against the creditors of the mortgagor; and where the record thereof was delayed for more than six months, and was made only two days prior to the adjudication in insolvency of the mortgagor, the mortgage is void, especially as to the subsequent creditors of the mortgagor, who, without notice of the mortgage, rendered credit to him; and the assignee in insolvency, representing such creditors, who have proved their claims, may maintain an action to have the mortgage adjudged null and void as to them. [Garoutte, J., Van Dyke, J., and Harrison, J., dissenting.]

ID.—GENERAL RIGHTS OF CREDITORS—SPECIFIC LIEN OF INTEREST.—In general, a creditor at large cannot set aside a chattel mortgage for want of record, or any transfer of personal property for want of an immediate delivery and change of possession, if he has not first

acquired an attachment lien, or a judgment and levy under execution or some specific interest in the mortgage property.

II.—PREVENTION OF SUIT BY INSOLVENCY—PROOF OF CLAIMS AGAINST INSOLVENT DEBTOR—REPRESENTATION OF INTEREST BY ASSIGNEE.—Where creditors of an insolvent mortgagor of personal property are prevented from suing by reason of the adjudication of his insolvency, and are limited to the proof of their claims against him, such proof is the equivalent of a judgment, and shows sufficient interest of the creditors in the mortgaged property to warrant the assailing of the chattel mortgage as a void act for want of prompt record, and the assignee in insolvency represents the interest of the creditors, and may recover the property for their benefit.

III.—VOLUNTARY INSOLVENCY—EFFECT OF ADJUDICATION.—Where the debtor goes into voluntary insolvency, the adjudication in insolvency, in the absence of a showing to the contrary, is sufficient proof of the inadequacy of the property to pay the debts in full to justify a proceeding, on behalf of the creditors, to avoid a transfer or chattel mortgage which is void as to the creditors.

IV.—CODE PROVISIONS AS TO ASSIGNEE—GENERAL POWER UNDER INSOLVENT ACT.—The inclusion of the assignee in insolvency in section 3440 of the Civil Code, and the omission to refer to him in section 2957 of that code, does not affect the general power of the assignee in insolvency conferred by the Insolvent Act to represent the insolvent estate, and to maintain suits for the benefit of the creditors of the insolvent debtor in cases arising under section 2957.

APPEAL from a judgment of the Superior Court of Yolo County and from an order denying a new trial. W. H. Grant, Judge.

The facts are stated in the opinion of the court.

Charles W. Thomas, for Appellants.

Section 3440 of the code has no application to statutory chattel mortgages allowed by law, as distinguished from common-law mortgages of chattels. (*Rohrbough v. Johnson*, 107 Cal. 144; *Bank of Ukiah v. Moore*, 106 Cal. 673.) The action cannot be sustained as one brought under section 55 of the Insolvent Act, there being an entire absence of fraud. (*Matthews v. Chaboya*, 111 Cal. 435; *Hass v. Whittier-Fuller Co.*, 87 Cal. 613.) Nor can it be sustained as brought under sections 3439 and 3442 of the Civil Code, there being no intent to hinder or delay or defraud creditors. The right of creditors to attack a mortgage as fraudulent does not

pass to the assignee. (*Sandwich Mfg. Co. v. Wright*, 22 Fed. Rep. 631; cited with approval in *Francisco v. Aguirre*, 94 Cal. 180, 186, and *Babcock v. Chase*, 111 Cal. 351, 353.) Where the statute does not otherwise specify, a chattel mortgage may be recorded any time before specific liens or interests are acquired by others. (Jones on Chattel Mortgages, sec. 237.) No creditor who has not acquired a specific interest or lien can avoid an unfiled chattel mortgage. (*Thornburg v. Hand*, 7 Cal. 554; *Jones v. Graham*, 77 N. Y. 628; *Kitchen v. Lowery*, 127 N. Y. 53; *Cameron v. Marvin*, 26 Kan. 612 (627); Jones on Chattel Mortgages, sec. 245; Bump on Fraudulent Conveyances, secs. 450, 451; *Brown v. Campbell*, 100 Cal. 635; 38 Am. St. Rep. 314; *Tremaine v. Mortimer*, 128 N. Y. 1; *Button v. Rathbone*, 126 N. Y. 187; *Hicks v. Williams*, 17 Barb. 527.) An unfiled chattel mortgage good between the parties is good as against the assignee in insolvency of the mortgagor. (*Stewart v. Platt*, 101 N. S. 731 (739); *Overstreet v. Manning*, 67 Tex. 657; *Ransom v. Schmela*, 13 Neb. 73; *Gilbert v. Vail*, 60 Vt. 261; *Folsom v. Clemence*, 111 Mass. 273; *Chase v. Denny*, 130 Mass. 566.)

Philip Bruton, for Respondent.

The assignee in insolvency is not confined to powers given under section 55 of the Insolvent Act, but he represents the entire estate, under section 17 of that act, and he may set aside any transfer void as to the creditors, without reference to any question of fraud. (*Merrill v. Hurlburt*, 63 Cal. 494; *Brown v. Bank of Napa*, 77 Cal. 544.) The record in section 2497 of the Civil Code is the substitute for the delivery and change of possession of section 3440, and should be immediate. (*Berson v. Nunan*, 63 Cal. 550 (552); 2 Bigelow on Frauds, 252, 348; Bump on Fraudulent Conveyances, sec. 110, p. 113.) An unrecorded mortgage is void as to intervening creditors. (*Noyes v. Brace*, 8 S. Dak. 190; *Root Co. v. Harl*, 62 Mich. 420; *Sanger v. Guenther*, 73 Wis. 354; *Putnam v. Reynolds*, 44 Mich. 114; *Ryan Drug Co. v. Hoamsahl*, 89 Wis. 61; *Dempsey v. Pforzheimer*, 86 Mich. 652; *Crippen v. Jacobson*, 56 Mich. 386.) The adjudication of insolvency in the absence of a showing to the contrary is sufficient proof of the inadequacy of the estate to pay in-

debtedness. (*Turner v. Adams*, 46 Mo. 95; *Case v. Beauregard*, 101 U. S. 688.) The assignee in insolvency represents the creditors, who can only prove their claims, and cannot sue. (Insolvent Act 1880, sec. 45; *Schaller v. Wright*, 70 Iowa, 677; *Bingham v. Jordan*, 1 Allen, 373, 374; 79 Am. Dec. 748; *Pratt v. Curtis*, 2 Low. 87, 89; *Shackleford v. Collier*, 6 Bush. 149, 154; *Moore v. Young*, 4 Biss. 128, 132-36; *Walter v. Dashiell*, 1 Md. 455, 469, 470; *Diggs v. McCullough*, 69 Md. 592, 609; *Pillsbury v. Kingon*, 33 N. J. Eq. 283 (291); *Lindeman v. Ingham*, 36 Ohio St. 1; *Mann v. Flower*, 25 Minn. 503; *Southard v. Benner*, 72 N. Y. 427; *Shipman v. Aetna Ins. Co.*, 29 Conn. 252.)

THE COURT.—Upon further consideration we adhere to the following opinion and judgment heretofore rendered in Department:

“HENSHAW, J.—This action is brought by the assignee in insolvency of one Wilgus, seeking a decree declaring void against creditors a chattel mortgage executed by Wilgus to defendant Cannedy. The appeal is from the judgment upon the judgment-roll alone. The findings of fact negative all claim of actual fraud and of a violation of the provisions of the insolvency act. The mortgage was made upon February 17, 1893, for a valuable consideration, and for a like consideration was assigned to the defendant bank, which took without knowledge of Wilgus' contemplated insolvency. It was not recorded, however, until August 26, 1893, six months later, and two days before Wilgus, under his voluntary petition, was declared an insolvent. Intermediate the time of giving and the time of recording the mortgage Wilgus incurred debts, some of which were proved and allowed in the insolvency court. The creditors knew nothing of the mortgage until its recordation. The court, at the suit of the assignee, under the facts adjudged the mortgage to be null and void as to these creditors.

“Two leading questions are thus presented: 1. Is a chattel mortgage, withheld from record beyond a time reasonably necessary for its prompt recordation, void against creditors whose claims have arisen between the date of its execution and the date of its recordation? 2. May such a mortgage be declared void at the instance of the assignee in insolvency

those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer.' (Civ. Code, sec. 3440.)

" 'A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith, and for value, unless: 1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith, and without any design to hinder, delay, or defraud creditors; 2. It is acknowledged or proved, certified and recorded in like manner as grants of real property.' (Civ. Code, sec. 2957.)

"Thus, in the case of the articles of personal property enumerated in section 2955 of the code, recordation became a substitute for delivery and change of possession. 'The recording of the mortgage is, therefore, made by the code the equivalent of an immediate delivery and continued change of possession.' (*Berson v. Nunan*, 63 Cal. 550; *Martin v. Thompson*, 63 Cal. 3.)

"But here it is argued that, while the law makes recordation the substitute for an immediate delivery, it does not mean or require immediate recordation, but only provides that, when effected, recordation is the equivalent of immediate delivery and continued and actual change of possession. Considering that the law demands immediate delivery, and that recordation is but a substitute for it, it is not easy to see how an indefinitely delayed recordation may be said to take the place of an actual, immediate delivery. One being designed as a substitute for the other, what is the condition, in the one case, if the property be not immediately delivered? Indisputably, the mortgage is void as to creditors. What, then, is the condition in the other case for the indefinite period during which there has been no recordation? While recordation is lacking there is not only no equivalent for an immediate delivery, but there is no delivery at all. Recordation itself is the substitute for delivery.

"A prompt recordation most obviously takes the place of an immediate delivery, and a delayed recordation of a tardy delivery. How, then, can a recordation effected one year

or ten years after the execution of the mortgage be said to be the equivalent of the delivery which by the law is required to be made with all reasonable dispatch? Even more untenable does this argument seem when consideration is had for the manifest policy of these laws. The very object of them all, the reason for their being, is to prevent secret liens upon and interests in personal property. Says Chancellor Kent (2 Kent's Commentaries, *523): 'The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession. . . . It necessarily creates a secret encumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practice deceit upon mankind.' In *Palmer v. Howard*, 72 Cal. 293, it is said: 'It must be remembered, in general, that the policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or encumbrancers for value, and, in particular, that mortgages of personal property are permitted only in certain specified cases, and this only upon the observance of certain formalities designed to secure good faith, and to give notice to the world of the character of the transaction.' This language has very recently been quoted with approval in *Stockton Sav. etc. Soc. v. Purvis*, 112 Cal. 236; 53 Am. St. Rep. 210.

"With this for the unquestioned policy of the law, how can it successfully be urged that an interpretation which fosters and encourages the very evil which the law was designed to check can be the true one? A mortgage without immediate delivery would create a secret lien, admittedly void against creditors. Is a mortgage without immediate recordation any less a secret lien, or any less an evil to be avoided? Prior to the amendment to section 2955 of the Civil Code, adopted in 1895, as counsel well instance, if a person had desired to borrow money upon his farming implements he would have been compelled to transfer possession immediately under section 3440 of the Civil Code. By the amendment these implements are placed in the list of those upon which statutory

chattel mortgages may be given. Therefore, he may now make such a mortgage upon them without delivery. Did the legislature intend to accommodate the farmer by enabling him to retain possession and use of his property, while at the same time protecting the public by recordation? Or did it design to make fraud easier by framing an ever-increasing list of articles upon which might be placed secret liens? The mortgagor holding possession could thus obtain credit upon the strength of his apparent untrammelled ownership, while the mortgagee could defeat the creditors' recovery by recording his mortgage at any time before the levy of an attachment.

"Fassett v. Wise, 115 Cal. 316, which appellants cite, is not in point upon the proposition we have been considering. This court was there called upon to construe the sections of the Civil Code (2959, 2965) dealing with the place of recordation. It was insisted that the mortgage having been executed in Kings county, and the sheep having been removed thence to Tulare county before recordation anywhere, there was allowed under section 2965 of the Civil Code thirty days after such removal in which to record in Tulare county. It was decided that this section did not apply; that the mortgage was not recorded, and, therefore, not a mortgage at all as to creditors until after it had been placed on record both in Kings county and Tulare county. The effect as to creditors of the tardy recordation in Kings county was not determined.

"We conclude upon this question that our law requires immediate recordation in lieu of immediate delivery, and that when such recordation is not effected the mortgage 'is void as against creditors of the mortgagor.' The penalty for a failure to record promptly in the case of a mortgage is identical with the penalty under section 3440 for a failure to deliver promptly in the case of a sale. In either case the failure results in a legal fraud against those whom the statute enumerates and protects. Section 3440 excepts a 'mortgage when allowed by law' from the requirement of immediate delivery, because, and only because, the recordation takes the place of delivery. It certainly cannot be said that it was the design of the legislature to exclude the articles of personal property affected by such mortgages from the operations of the laws forbidding secret liens.

"But this, it is to be noted, does not mean that such a mortgage between the parties, and as to all the world, is absolutely void like an unrecorded builder's contract under the mechanic's lien law. It does mean, however, that it may be avoided at the instance of anyone in the enumerated classes—creditor, purchaser, or encumbrancer—whose right accrues during the time the recordation is withheld. Between the parties the unrecorded mortgage is, of course, valid. It is likewise valid against any creditor, purchaser, or encumbrancer whose claim arises after recordation. So, too, the mortgagee's interest in or title to the chattel affected by the unrecorded mortgage may be successfully asserted against a mere trespasser. Whether it is void against a creditor who extended credit before the making of the mortgage does not here call for decision. Suffice it to say that upon this, as well as upon many other questions concerning chattel mortgages, an irreconcilable conflict in the decisions of the courts upon statutes practically identical in language will be discovered. In illustration of this may be cited *Stephens v. Perrine*, 143 N. Y. 476; *Dempsey v. Pforzheimer*, 86 Mich. 652.

"But it is insisted that, even if an unrecorded mortgage is void at the instance of creditors, only those creditors may take advantage of the law who by judgment and execution levy, or at least by attachment levy, have acquired a lien upon the property before recordation. In this appellants place reliance upon section 237 of Jones on Chattel Mortgages, and upon the authorities which the learned author cites in support of his text. He speaks as follows: 'The only effect of delay in recording or filing a mortgage is to render it void as against intervening purchasers or mortgagees, or creditors obtaining liens by attachment, judgment, or execution. If the time within which a mortgage must be recorded or filed be not expressly prescribed by statute, it is sufficient that this be done at any time before possession is taken, or interest or liens are acquired by others, no matter how long this be after the execution of the mortgage. The record of a mortgage being only a substitute for the mortgagee's possession, it follows that, in the absence of any record, possession taken by the mortgagee before others have acquired any interest in the property makes his mortgage lien complete.'

"To this the answer is that such is not the law of this state. In terms, this rule is limited to those cases where immediate recordation is not required by law, and in our state, as has been discussed, as well as in other states under similar and wellnigh identical statutes, as will be shown, immediate recordation is exacted. Again, as we have seen, a perfect analogy exists in our law between the case of sales and the case of mortgages of personal property. In both, immediate delivery, or its equivalent—immediate recordation—must take place. In each the result of a failure in this particular is to render the contract absolutely void as to creditors. In *Watson v. Rodgers*, 53 Cal. 402, it is held that a sale of personal property unaccompanied by an immediate delivery is void as to creditors, notwithstanding the delivery was effected before the creditors acquired a lien by attachment levy. In *Chenery v. Palmer*, *supra*, it is decided that, whether the contract is a sale or a mortgage, in either event, not being followed by immediate delivery, it was void as to creditors, though delivery was made before levy. In other words, two distinct propositions have thus been decided: 1. That neither in the case of a sale nor of a mortgage would a delayed delivery validate the contract against creditors; and 2. That it was not necessary that these creditors should have acquired rights by judgment or attachment before delivery of the chattel sold or mortgaged to warrant their setting aside the transfer. Our recordation laws, admittedly being but a substitute for such immediate delivery, certainly have not changed the principles here announced, and should not be said to have changed the rule which elsewhere finds abundant support.

"It is recognized that the authorities are in conflict upon this proposition, and that in some states it is held that a creditor must have acquired a lien before recordation of the mortgage, else it is valid against him. Such we have said is not the rule in this state. It is not the rule in Oregon, whose law provides: 'A mortgage of personal property is void as against creditors of the mortgagor . . . unless it is recorded in the same manner as is required by law in conveyances of real property.' (Or. Gen. Stats., sec. 1648; *Willamette Casket Co. v. Cross*, etc., 12 Wash. 190.) The same may be said of Wisconsin, whose statute is as follows: 'No mort-

gage of personal property shall be valid as against third persons unless the property be delivered to and retained by the mortgagee, or unless the mortgage or a copy thereof be filed.' (Wis. Rev. Stats., sec. 2313; *Ryan Drug Store Co. v. Hoamb-sahl*, 89 Wis. 61.) The Michigan statute provides (Howell's Ann. Stats. of Mich., sec. 6193): 'Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing mortgaged, shall be absolutely void as against the creditors of the mortgagor, . . . unless the mortgage or a true copy thereof shall be filed in the office of the township clerk,' etc. In *Crippen v. Jacobson*, 56 Mich. 386, and in *Dempsey v. Pforzheimer*, *supra*, it is held that such mortgages, under the law as quoted, are absolutely void against creditors whose claims have arisen during the time they were withheld from recordation, notwithstanding the fact that they had acquired no lien upon the specific property until after recordation or possession taken. Without further quotations, it is sufficient to cite additionally upon this point the cases of *Noyes v. Brace*, 8 S. Dak. 190; *Thompson v. Van Vechten*, 27 N. Y. 581; *Karst v. Gane*, 136 N. Y. 316; *Stephens v. Perrine*, *supra*; *Roe v. Meding*, 53 N. J. Eq. 350; *Simpson v. Harris*, 21 Nev. 353; *Farmers' etc. Bank v. Anthony*, 39 Neb. 343; *Kimball Co. v. Kirby*, 4 S. Dak. 152.

"Of course, it is true in general that a creditor at large of the mortgagor cannot set aside a mortgage for lack of recordation, any more than can such a creditor set aside a sale void for want of immediate delivery. He must come first with his judgment lien, execution levy, attachment, or some other process or right by which he has acquired a specific interest in or claim upon the particular property. But since, as has been discussed, he may acquire this lien or right after recordation, and since, when acquired, the mortgage is void as to him, it makes little difference whether it be stated as the rule that the law requires immediate recordation, or whether it be said that, while it does not require immediate recordation, the mortgage is void as to creditors who have become such during the time recordation has been delayed. It is but a change in the form of words, while all of the legal effects remain the

same. The law may be said to contemplate or require immediate recordation because the rights of creditors arising before recordation are superior to those of the mortgagee, or it may be said that, while the law does not exact immediate recordation, it renders the mortgage void as to such creditors, unless it be so recorded. In both cases the results are identical, and over any precise form of expression there need be no haggling.

"In this case the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged an insolvent. After that judgment, by force of the insolvency act itself, they were prevented from resorting to any proceeding in law or equity for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when those claims were allowed and approved the questions involved in them became *res judicata*. The presentation, allowance, and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. (*Roan v. Winn*, 93 Mo. 503.)

"We are not advised, nor do we understand it to be the rule in this state, that a judgment creditor must exhaust all other property before avoiding a sale, transfer, or mortgage by his debtor, which by the law is declared as to him void, or a fraud upon his rights. But, if it should be said that it is necessary for the creditor to show that he cannot otherwise make good his debt, we think a sufficient showing to that end is made in this case by the undenied averment of the debtor's voluntary insolvency. Insolvency in the law has two distinct and well-defined significations. Anderson, in his Law Dictionary, defines an insolvent as 'a person who is not pecuniarily able to pay his debts as they fall due; also a person whose property, if distributed among his creditors, would not be sufficient to pay their claims in full.' Our insolvency act recognizes these distinct meanings. In proceedings for involuntary insolvency (Insolvent Act, sec. 8), aside from the acts of fraud therein enumerated, one may be cast into insolvency

who is shown to be unable to meet his debts as they fall due; yet his assets may be ample for the full payment of his debts, though not immediately available for their prompt payment. But where one voluntarily seeks the benefit of the act he may not aver his inability to pay his debts as they fall due, but by verified petition must allege 'his inability to pay all his debts in full,' and the adjudication in insolvency is made pursuant to that allegation. In such a case certainly the adjudication of insolvency, in the absence of a showing to the contrary, is sufficient proof of the inadequacy of the property to pay the debts in full. (*Turner v. Adams*, 46 Mo. 95; *Case v. Beauregard*, 101 U. S. 688.)

"2. We are come now to consider whether the assignee representing these creditors whose claims have been proved and allowed may institute on their behalf an equitable action to avoid the mortgage, an action which, but for the insolvency of the debtor, the creditors themselves unquestionably could have maintained after pressing their debts to judgment. The assignee's right so to do is combated upon two grounds: 1. Because, while section 3440 of the Civil Code declares that a transfer or lien upon personal property may be avoided at the instance of the creditor, or of him upon whom the estate of the debtor devolves in trust, no such expression is found in section 2957, which declares merely that a mortgage of personal property is void as against creditors, not expressly including either successors in interest or trustees; 2. It is contended that, in any event, the assignee in insolvency can attack the acts of the insolvent on behalf of the creditors only for actual fraud, and that the act here contemplated is but a constructive legal fraud. It may here be suggested that this so-called legal fraud was, if anything, a fraud, not of the mortgagor, who is to suffer nothing by it, but of the mortgagee, who may be compelled to lose his lien for his own remissness and neglect. Says Mr. Justice Cooley, in *Putnam v. Reynolds*, 44 Mich. 114: 'Even creditors, it is said, cannot attack the mortgage, except indirectly through a seizure of the property by attachment, or other suitable process. This is doubtless true where the invalidity of the mortgage arises from the fraud of the mortgagor; but whether the same rule will apply when the mortgage was originally valid, but is

made void by the neglect of the mortgagee, may well be questioned. It would be easy to suggest weighty considerations arising in such cases, but not existing in the case of a fraudulent mortgage, and which it might well be thought should control.' We do not regard the omission in section 2957 of the Civil Code to declare that those upon whom the estate of the debtor may devolve in trust have the right to avoid the mortgage, as being at all important. It was early held under the English statutes of George the Fourth (1 George IV, c. 119; 7 George IV, c. 57), which conferred no right upon the assignee in insolvency to avoid conveyances of the assignor, and in cases where this fact was pressed upon the attention of the court, that the assignee had this right by virtue of the fact that he represented the creditors. (*Butcher v. Harrison*, 4 Barn. & Adol. 129; *Doe v. Ball*, 11 Mees. & W. 531; *Norcott v. Dodd*, 1 Craig & P. 100.) In *Holmes v. Penny*, 3 Kay & J. 90, a bill was brought by the assignee in insolvency. Vice-Chancellor Wood, discussing his right so to do, said: 'I have no doubt of the right of the assignee in insolvency to sue in the case. In *Doe v. Ball*, *supra*, Baron Parke and the present lord chancellor decided that an assignee in insolvency might properly represent all the creditors in proceedings to set aside an instrument which any of the creditors might have instituted.' The failure to observe the well-defined distinction between the powers of the assignee in insolvency, who thus represents the creditors, and those of an assignee for the benefit of creditors, who is the representative of the assignor, has led to much conflict of authority upon this question. In this state, it is held that an assignee for the benefit of creditors may not maintain such an action, but the distinction between such an assignee and the assignee in insolvency is clearly pointed out. Thus, in *Francisco v. Aguirre*, 94 Cal. 180, in discussing the conflict of authority which exists upon the question, it is said: 'In other states the assignee for the benefit of creditors has been held to have such right upon the ground that by virtue of statutory provisions the assignment partakes so far of the nature of a proceeding in bankruptcy that the assignee succeeds to the same rights as does an assignee in bankruptcy.'

"*Merrill v. Hurlburt*, 63 Cal. 496; and *Brown v. Bank of*

Napa, 77 Cal. 544, were both by the assignee in insolvency to set aside a sale of personal property for legal fraud. In both the action was upheld. It is determined, therefore, in this state that the powers of the assignee in the premises are not limited to cases of fraud in fact.

"But, independent of those reasons, there is still another consideration by which such an action as this upon the part of the assignee in insolvency is justified and upheld. By sections 18 and 21 of the Insolvent Act all of the estate of the insolvent passes to the assignee. As is said in *Brown v. Bank of Napa*, *supra*: 'The assignee has the right to sue for and recover everything due to the estate for the benefit of the creditors.' While, as between the assignor and his vendee or mortgagee, the transaction is valid, as between him and his creditors it is void, and the title still remains in him. This title passes to the assignee in insolvency for the benefit of the creditors, and justifies him in maintaining an action in their behalf to reduce the property to possession. 'The statute provides for the assignment of property by insolvents to the end that it may be appropriated to the payment of debts. It authorizes proceedings to subject the property of debtors to the payment of their debts. As between the creditors and the debtor who fraudulently conveys property to defeat them, he is regarded as holding the title to or an interest in the property conveyed, and it may for that reason be made subject to his debts. If he holds no such interest, the law will not permit the creditors to appropriate the property, for it would not suffer the property of another to be taken for his debts. It thus appears that the debtor did hold as to the creditors an interest in the property, and that it passed to the assignee. It is said that the assignee takes the derivative title from the debtor and stands in his shoes. This is correct so far as persons other than creditors are concerned. As we have seen, as to creditors the assignee is regarded by law as holding an interest in the title to the land.' (*Schaller v. Wright*, 70 Iowa, 667; *Jones v. Yates*, 9 Barn. & C. 532; *Pillsbury v. Kingon*, 33 N. J. Eq. 287.) By reason of the title which is thus vested in him we hold that the assignee may maintain this action.

"It is said that the judgment should not be upheld be-

cause of the absence of a finding that the recordation was not seasonably made. It is averred, and not denied, that six months elapsed between the making and the recording of the mortgage. This unexplained delay would, as matter of law, and without a finding, be sufficient to show that the recordation was not seasonable. Or, taking it in the other view which has been presented, even if it be said that the law does not require immediate recordation, still the mortgage is void as to those who during the time that the mortgage has been withheld from the records have given credit to the mortgagor, and it is in favor of these that the mortgage has been set aside.

"The judgment appealed from is affirmed."

GAROUTTE, J., dissenting.—I dissent from the conclusion declared in this case. I do not believe the bar of this state construe the law upon this question as it is here construed, and owing to the important principle involved I feel compelled to briefly indicate why this case should be decided the other way.

The true solution of the question raised upon this appeal is dependent upon the construction to be given section 2957 of the Civil Code, which provides: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers in good faith and for value, unless: 1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay or defraud creditors; 2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property."

By virtue of the foregoing provision of the code it is now held that a chattel mortgage must be immediately recorded upon its execution, or, *ipso facto*, it is void as to creditors; and the fact that the mortgage may be recorded before any creditor takes a single step toward judicially enforcing his claims is a matter wholly immaterial. The inevitable result flowing from this decision will be to stamp many chattel mortgages as worthless property, when up to the present moment their genuineness has never been doubted. The serious results to follow from thus holding should lead the court to an opposite conclusion if a fair construction of the statute justifies it. For the simplest of reasons it is apparent that

it would be work well done to declare the principles of law governing the recording of chattel mortgages to be similar to those governing the recordation of mortgages of real estate; for the law as to the effect of recordation of mortgages upon real estate is well defined and understood. And now, if in the case of chattel mortgages we declare the same principles to be controlling, a broad road is marked out which all may follow. But a decision to the contrary simply blots out all roads. If it be held under this statute that chattel mortgages similar to the one here involved are void as to creditors, the decision will produce an abundant crop of litigation. This litigation will not only arise upon the rights of creditors as bearing upon chattel mortgages now outstanding, but as long as the statute stands it will be a prolific source of litigation as to the respective rights of creditors and mortgagees.

I am satisfied the provisions of the code only mean that unrecorded chattel mortgages are void as to creditors who assert their claims by attachment or otherwise before a recordation is had. This construction may be maintained without violating any principle of statutory interpretation, and for the reasons already suggested, if for no other, the court should so declare. I know of no reason based upon sound policy which may be urged in favor of a contrary construction. It is suggested in the majority opinion that such a construction of the statute cannot be declared because the policy of our law is opposed to secret liens. But my construction of the statute is directly in line with a policy opposed to secret liens. Until the chattel mortgage is recorded it is void as to third parties, and is only valid between the parties. A mortgage only valid between the parties is in no sense a secret lien as to third parties, and public policy is in no way concerned in such a mortgage. Men may pass their days and nights in mutually giving each other chattel mortgages upon their property, and it is no concern of the public. The public has no interest in that kind of a transaction, but is a totally indifferent party.

In a great many of the states the statute does fix the time when a chattel mortgage must be recorded. In Ohio, where the statute even declares that a chattel mortgage shall be recorded "forthwith," under the penalty of being void as to creditors if not so recorded, the highest court of that state

held such a mortgage valid as against all creditors whose rights had not attached previous to the recordation. (*Wilson v. Leslie*, 20 Ohio, 161.) But we will not attempt a review of the authorities of other states bearing upon the question here involved. It is sufficient to say they are irreconcilable, although it may be safely claimed that a large preponderance are favorable to the conclusion we here declare. Some of these authorities are incidentally enumerated in the case of *Fassett v. Wise*, 115 Cal. 322.

Section 3440 of the Civil Code, among other matters, declares: "Every transfer of personal property, . . . and every lien thereon, other than a mortgage, when allowed by law, . . . is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession." It is now sought by a process of reasoning by analogy from the provisions of section 3440 to construe the aforesaid section upon chattel mortgages as requiring an immediate recordation of the mortgage. Reasoning by analogy is not the best mode of reasoning, and conclusions thus deduced are often unsound. It may be further suggested that in a proceeding purely and entirely statutory the word "immediately" should not be construed into the statute by a process of analogous reasoning. If *quasi* judicial legislation is ever justified, it should rest upon a stronger foundation. If the legislature thought that chattel mortgages should be recorded immediately, it was a very easy matter for that body to have said so; and we see no authority to justify this court in invoking the provisions of section 3440 as to sales of personal property for the purpose of assisting in the construction of section 2957 as to chattel mortgages.

Section 2957 of the Civil Code was ingrafted therein in lieu of an act of the legislature of 1857 covering the whole question of chattel mortgages, and not, as the main opinion declares, in place of the statute of 1850. Whatever analogy existed under the act of 1850 between sales and mortgages of personal property was completely annihilated when the chattel mortgage act of 1857 was passed. An examination

of a few of the provisions of that act shows this to a demonstration. For those provisions are directly opposed to the principles of law declared in the act of 1850, and likewise directly opposed to the decisions of this court, cited in the main opinion, rendered under the act of 1850. And I feel assured they are likewise opposed to the principles recognized and approved upon which the present decision of the court is rested. The act of 1857, section 7, provides: "The mortgagee in all mortgages made under this act shall be allowed one day for every twenty miles of the distance between his residence and the county recorder's office where such mortgage ought by law to be recorded to conform to the provisions of this act, before any attachment shall be valid made by the creditors of the mortgagor." This was the law at the time the code was adopted, and it is therefore evident that the statute at the time pertaining to the sale and transfer of personal property had no relationship whatever with the execution and recordation of chattel mortgages. Again, the subject matter of section 2957 of the Civil Code is found in this chattel mortgage act of 1857. Yet that act itself, in section 7, which I have just quoted, places a construction upon those provisions entirely in line with my conclusion, and that construction should have great weight in deducing the proper conclusion in this case. Section 7 provides that the mortgagee shall have a certain number of days—dependent upon the distance he lives from the recorder's office—in which to record his mortgage before it shall be void as to attaching creditors. If respondent's position be the sound one, then that provision of the act should have simply said "creditors," and should have omitted any qualifications whatever as to attaching creditors. Indeed, the substance of this identical provision of the chattel mortgage act of 1857 was carried into the original enactment of the Civil Code. (Civ. Code, sec. 2937.) This section conclusively demonstrates that the close relationship existing in the early legal history of the state between chattel mortgages and sales of personal property never existed after 1857.

Let us see into what deep water this reasoning by analogy leads us. If by analogy we are justified in inserting the word "immediately" in the chattel mortgage act, then, by the same analogy, it must be held that a chattel mortgage is

void as to all creditors of the mortgagor having claims at any time during the period between the execution of the chattel mortgage and its recordation. Indeed, it has been held by this court in *Cardenas v. Miller*, 108 Cal. 258, 49 Am. St. Rep. 84, that: "The term 'creditors' is general and applies to creditors existing prior to the mortgage as well as subsequent." Yet it is not even claimed here that this mortgage is void as to creditors existing at the time it was executed, and no such claim can be made, for then the whole superstructure of the court's reasoning, builded story after story upon the theory of the creation of a false credit in the mortgagor and a public policy opposed to secret liens, would come down with a crash; for, as to creditors in existence prior to the execution of the mortgage, there would be no false credit in the mortgagor and no secret lien in existence at the time their debts were created. If these two sections of the code are required to fill the same measure, and that a measure furnished by principles of analogous reasoning, the transfer of personal property and the chattel mortgage are each void as to the same class or classes of creditors; and, in the absence of an express legislative enactment to the contrary, this court has no right to hold otherwise.

In a transfer of personal property there must be an immediate delivery; *ergo*, it is argued the chattel mortgage must have immediate recordation. Such a construction of the statute in numberless cases demands an impossibility. The statute says that a chattel mortgage must be recorded in the county where the mortgagor resides, and also where the property is situated. This express demand of the statute often requires weeks to carry out. It is impossible that the two recordations shall take place immediately, or even at the same time. Section 2962 of the Civil Code allows a chattel mortgage to be given upon personal property situated in different counties. It is impossible to see how such a mortgage could be recorded immediately. What would be said as to the immediate recordation of a chattel mortgage executed in the county where the mortgagor resides and where the property is situated, but one hundred miles distant from the recorder's office? If a mortgage of that character is to be declared void as to creditors because not recorded immediately, it is probable that such a conclusion would invalidate

recorded chattel mortgages in many counties of the state. Again, if a chattel mortgage may not be executed one hundred miles from the recorder's office because an immediate recordation under such circumstances would be impossible, then how near to the recorder's office must the execution of the mortgage take place in order that it may be recorded immediately? This interrogatory presents an interesting question and suggests a broad and fertile field for future litigation.

It is also insisted that a construction of the statute demanding an immediate recordation of a chattel mortgage is justified from general language found in *Berson v. Nunan*, *supra*, to the effect that the recordation of a chattel mortgage is an equivalent of the immediate delivery demanded by section 3440 of the Civil Code. There was no element of immediate recordation of the chattel mortgage involved in that case, and the court never for a moment thought it was declaring the law upon that important question when it used the language to which we are referred. The language used by the court was as clearly in point upon the case of a future recordation of a chattel mortgage as in the case of an immediate recordation. At that time the court was speaking of the effect of the recordation of the mortgage, entirely disconnected from any question as to the time of recordation. This is conclusively apparent when we find the court upon the very same page of the opinion declaring: "The object to be attained by requiring the recording of mortgages of personal property is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is to give notice to the public of all existing encumbrances upon real or personal estate by mortgages." In view of this language *Berson v. Nunan*, *supra*, affords but a foundation of sand upon which to rest the weighty results flowing from this decision. As distinguished from *Berson v. Nunan*, *supra*, it is said in *Martin v. Thompson*, 63 Cal. 4, that the chapter of the Civil Code treating of mortgages of personal property "substitutes the record of the mortgage for the actual and continued change of possession in case of other transfers, required by section 3440. The purpose of

the actual delivery in the one case, and of the record or registry in the other, is to give notice to those who shall deal with the vendor or mortgagor." In speaking of the chattel mortgage act in *Beamer v. Freeman*, 84 Cal. 556, this court said: "This law substitutes the record of the mortgage for the actual delivery and continued change of possession made essential to effect transfers in other cases by section 3440 of the Civil Code." It would seem that the word "immediate" was intentionally omitted by the court in the language quoted in the two foregoing cases; and the language there used entirely and accurately expresses the law upon this question.

In conclusion it may be suggested that section 3431 of the Civil Code provides: "In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such a contract."

In this case there is no actual fraud. Neither is there any constructive fraud, for the law has not so declared. In the face of this provision of the statute it is impossible to see how the mortgagor's creditors have any rights as to the mortgaged property until they have first secured a lien upon it. In this case, before they took any steps to secure the lien the chattel mortgage was recorded.

For the foregoing reasons I dissent from the judgment.

Van Dyke, J., and Harrison, J., concurred in the dissenting opinion.

[S. F. No. 1097. In Bank.—December 26, 1899.]

GEORGE DAVIS, Appellant, v. PACIFIC TELEPHONE
AND TELEGRAPH COMPANY, Respondent.

MALICIOUS PROSECUTION—CHARGE OF MISDEMEANOR—BURDEN OF PROOF.

In an action for a malicious prosecution by the defendant of the plaintiff in causing his arrest and prosecution upon a charge of misdemeanor, maliciously and without probable cause, the burden of proof is upon the plaintiff to show both malice and want of probable cause.

ID.—WANT OF PROBABLE CAUSE.—In proving want of probable cause, the plaintiff must show that the arrest and prosecution were not under such circumstances as would justify the suspicion in a reasonable man that the charge was true.

ID.—WILLFUL CUTTING OF TELEGRAPH WIRES—WANT OF PROBABLE CAUSE NOT SHOWN.—Where telegraph wires were willfully cut by the plaintiff under the advice of counsel for the purpose of testing the legality of wires erected and maintained under a franchise of the board of supervisors, and with the expectation of arrest therefor, probable cause appears for the prosecution, and the fact that the plaintiff was discharged in the police court does not establish a want of probable cause for the prosecution, nor require the submission to the jury of that question.

ID.—RECOVERY LIMITED TO COMPLAINT—VARIANCE.—A recovery can only be had upon the cause of action alleged in the complaint; and no recovery can be had upon some other and distinct cause of action developed by the proofs.

ID.—CHARGE OF MALICIOUS PROSECUTION—FALSE IMPRISONMENT NOT ALLEGED—INCONSISTENT CAUSES OF ACTION.—Where the gist of the action, as brought, appears from the complaint to be a malicious prosecution for a misdemeanor, and an arrest therefor under legal process, there can be no recovery for a false imprisonment, which must proceed upon an allegation of arrest without legal authority, and no evidence upon the latter charge should be submitted to the jury, nor should any instructions be given thereupon. Each of these causes of action is distinct from the other, and the two are inconsistent with each other.

ID.—AUTHORITY FOR ARREST—PLEADING—PRESUMPTION.—A private person, as well as an officer, may arrest another for a public offense committed or attempted in his presence, and where the complaint alleges that the plaintiff was charged with a criminal offense, and that the defendant procured a police officer to arrest the plaintiff, and does not allege that the arrest was without authority, it must be presumed to have been made by the officer upon a proper warrant, or by reason of the commission of the offense in the presence of the officer.

ID.—PROSECUTION FOR CUTTING "TELEGRAPH" WIRES—"TELEPHONE"—CONSTRUCTION OF PENAL CODE.—A "telephone" is included within the meaning of the word "telegraph," as used in section 591 of the Penal Code, forbidding the removal or obstruction of any line of telegraph or the severing of any wire thereof; and a criminal prosecution will lie under that section for the cutting or destruction of telephone wires.

ID.—STRICT CONSTRUCTION OF PENAL STATUTES—COMMON-LAW RULE INAPPLICABLE.—The rule of the common law that penal statutes are to be strictly construed has no application to the construction of the Penal Code, which is regulated by section 4 of that code.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William S. Daingerfield, Judge.

The facts are stated in the opinion of the court.

Crandall & Bull, for Appellant.

The defendant was liable, under the complaint, for a false imprisonment, the arrest being without authority, and the defendant must show lawful authority. (*Ah Fong v. Sternes*, 79 Cal. 30; *People v. McGrew*, 77 Cal. 570; *Allen v. Parkhurst*, 10 Vt. 557; *Philips v. Trull*, 11 Johns. 486; *Arkansas City Bank v. McDowell*, 7 Kan. App. 568.) The question of want of probable cause was for the jury. (*Ball v. Rawles*, 93 Cal. 234; 27 Am. St. Rep. 174; *Retter v. Ewing*, 174 Pa. St. 34.)

E. S. Pillsbury, and F. D. Madison, for Respondent.

The arrest by a private person was lawful, and the action of the officer must be presumed lawful. (Pen. Code, sec. 877; *Butolph v. Blust*, 5 Lans. 84; *Taylor v. Strong*, 3 Wend. 385; *Main v. McCarty*, 15 Ill. 441; *Fry v. Kaessner*, 48 Neb. 133; *Baltimore etc R. R. Co. c. Cain*, 81 Md. 87; *Ramsey v. State*, 92 Ga. 53; *Dilger v. Commonwealth*, 88 Ky. 550; *Derecourt v. Corbishley*, 5 El. & B. 188.) The complaint states a cause of action for malicious prosecution, and alleges facts inconsistent with an action for false imprisonment. (*Colter v. Lower*, 35 Ind. 285; 9 Am. Rep. 735; *Turpin v. Remy*, 3 Blackf. 210; *Seeger v. Pfeifer*, 35 Ind. 13; *Murphy v. Martin*, 58 Wis. 276; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316; 54 Am. Rep. 616; *Nebenzahl v. Townsend*, 10 Daly, 232.) The arrest was in good faith, without malice and for probable cause, and the nonsuit was properly granted; the plaintiff having wholly to sustain the burden of proving malice and want of probable cause. (*Potter v. Seale*, 8 Cal. 217; *Grant v. Moore*, 29 Cal. 644; *Ganea v. Southern Pac. R. R. Co.*, 51 Cal. 140; *Dwain v. Descalso*, 66 Cal. 415; *Jones v. Jones*, 71 Cal. 89; *Lacey v. Porter*, 103 Cal. 597, 605; *Smith v. Liverpool Ins. Co.*, 107 Cal. 432; *Legallee v. Blaisdell*, 134 Mass. 473.) The cutting of telephone wires was the cutting of telegraph wires within the meaning of section 591 of the Penal Code. (*Attorney General v. Edison Teleph. Co.*, 6 Q. B. Div. 244; *Telephone Co. v. Board of Equalization*, 67 Iowa, 254; *Chesapeake Teleph. Co. v. Baltimore etc. Tel. Co.*, 66 Md. 399; 59 Am. Rep. 167; *Franklin v. North Western Teleph. Co.*, 69 Iowa, 97; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32; *Duke v. Central N. J. Tel. Co.*, 53 N. J. L. 341; 25 Am. & Eng. Ency. of Law, 746; Pen. Code, sec. 4.)

HENSHAW, J.—A rehearing was granted in this case for consideration of a question not discussed in the Department opinion, namely, whether “telephone” is included within the meaning of “telegraph,” as used in section 591 of the Penal Code. It appeared that in the criminal action the defendant was charged with cutting telegraph wires, while the facts without dispute disclosed that the wires which he cut were used as telephone wires. The importance of the consideration in the case at bar arises from the fact that if telephone wires are not within the purview of section 591 it would tend to show lack of probable cause to procure the arrest and prosecution of a person charging him with cutting telegraph wires, when the known fact was that he had cut telephone wires.

The cases are numerous where the question has come under consideration, and the holding of the courts has been uniform that “telephone” is included within the meaning of “telegraph.” Many of these cases are noted in 25 American and English Encyclopedia of Law, at page 746. In *Attorney General v. Edison Teleph. Co.*, 6 Q. B. Div. 244, it was held that a telephone was a telegraph within the meaning of the telegraph acts, although the telephone was not invented or contemplated at the time of the passage of those acts. It was further declared that a conversation through the telephone was a message, or, at all events, “a communication transmitted by a telegraph, and therefore a telegram within the meaning of the acts.” In *Richmond v. Southern Bell Teleph. etc. Co.*, 85 Fed. Rep. 19, the circuit court of appeals, construing an act of Congress of 1866 relative to “telegraph companies,” and answering the question whether those words included telephone companies, declared that each was but a form of use, the product and result of the same principle, and that the names were only used to distinguish the method of communication. In *Chesapeake etc. Teleph. Co. v. Baltimore etc. Tel. Co.*, 66 Md. 399, 59 Am. Rep. 167, the court, in construing an early act relative to telegraph companies, declared that the term “telegraph,” which means and includes any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, embraces the telephone. In *Iowa etc. Tel. Co. v. Board of Equalization*, 67 Iowa, 250, it was held that, by reason of the substantial identity of telephonic and tele-

graphic modes of communication, the telephone company was to be regarded for purposes of taxation as coming under the denomination of a telegraph company.

These cases are sufficient by way of illustration, though many more could be instanced. They are civil cases, it is true, but they at least serve to show the unanimity and uniformity of the courts' determinations upon the question.

If the consideration could be limited to a strict etymological point of view, it would have to be conceded at once that there is a difference in the meaning of the two words, the one conveying the idea or transmission of writing to a distance, the other the transmission of sound to a distance. In the very early history of the telegraph it is a matter of common knowledge that there was an actual recordation of letters under the Morse code. That soon passed away, and the telegraph operator of to-day receives by sound upon a principle no different from that which obtains in the telephone. Again, in the case of submarine cables neither sound nor writing is always employed, but the varying deflections of an indicator within sight of the receiver serve the like purpose. The words, therefore, cannot be limited to their etymological meaning, and consideration must be had to their present sense and acceptation. Anderson's Dictionary of Law, defining "telegraph," says that it "includes any apparatus for transmitting messages or other communications by means of electric signals." Defining "telephone," he declares it to be "a conversation held through a telephone, a message or a communication transmitted by a telegraph—a telegram. A telephone is a telegraph. The idea conveyed by each term is the sending of intelligence to a distance." Accepting these definitions—and they are well supported—the term "telegraph" means any apparatus for transmitting messages by means of electric currents and signals, and embraces within its meaning the narrower word "telephone."

But is this construction justifiable in the case of the penal statute? Section 4 of our Penal Code provides that "the rule of the common law that penal statutes are to be strictly construed has no application to this code. All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice." In

contemplation of this section, in recognition of the fact that a substantial identity exists between the two words, we think no hesitation need be expressed in declaring that under section 591 of the Penal Code a criminal prosecution will lie for the illegal destruction of a telephone wire.

The opinion heretofore rendered in Department is, therefore, adopted, and the judgment is affirmed.

Garoutte, J., McFarland, J., Van Dyke, J., Temple, J., Harrison, J., and Beatty, C. J., concurred.

The following is the opinion of the Department One above referred to, rendered on the 12th of June, 1899:

COOPER, C.—This is an action to recover damages for malicious prosecution. The complaint alleges that on the seventeenth day of October, 1891, the defendant caused a complaint to be verified and filed against the plaintiff, charging him with a criminal offense, to wit, "with willfully, unlawfully, and maliciously taking down, removing, injuring, and obstructing a line of telegraph in the city and county of San Francisco," and that on said complaint the defendant caused plaintiff to be arrested and prosecuted in the police court of said city. That in so doing "the defendant acted maliciously and without probable cause," and that plaintiff was afterward acquitted of the said offense. The plaintiff was charged in said police court with the violation of section 591 of the Penal Code, which is as follows: "Every person who maliciously takes down, removes, injures, or obstructs any line of telegraph, or any part thereof, or appurtenance or apparatus connected therewith, or severs any wire thereof, is guilty of a misdemeanor."

The undisputed facts as established at the trial were substantially as follows: A number of persons engaged in the business of moving houses in the city and county of San Francisco thought that the telegraph and telephone companies had no right to make the parties so engaged in moving houses pay the expense of moving or changing the telegraph wires when such removal or change became necessary by the removal of a house. Controversies had before arisen as to the right of the companies to exact payment of the house-movers. Accordingly, the house-movers organized for the purpose of

testing the law, and employed an attorney. The attorney advised the plaintiff, who appears to have been the treasurer and manager of the association, to serve a written notice upon defendant to the effect that he was moving a house on Union street in said city, and that the wires used by defendant were an obstruction to him, and demanding that the wires be removed by 1 o'clock of the morning of October 17, 1891. The notice was accordingly prepared by the attorney for the association and served by plaintiff upon defendant. Plaintiff, upon serving the notice, said nothing in explanation, but walked away. He had been advised by the attorney so retained that the way to test the law was to cut the wires after serving notice, and that he would then probably be arrested. The attorney prepared a bail bond for him and agreed to attend to the case and to all the "wire cases" that should come up. At 1 o'clock on the morning of the 17th of October the president and superintendent of defendant and several police officers appeared at the place designated in the notice. Plaintiff did not then cut the wires, but the next day, during the busy part of the day, and while no police officers were around, he cut about a dozen of defendant's wires in the presence of an employee of defendant. The employee immediately telephoned for the police officers, and in fifteen or twenty minutes two came up, and upon their arrival the employee arrested the plaintiff and turned him over to the police. The whole party then boarded a Union street car and proceeded to the old city hall, where plaintiff was charged with cutting telegraph wires, contrary to the provisions of law and section 591 of the Penal Code. Bail was fixed at sixty dollars, which plaintiff deposited instead of giving the bond prepared by his attorney, and was then released. He was discharged in the police court. After testimony was given, establishing the facts as herein stated, in the court below, defendant made a motion for a nonsuit upon several grounds, among others upon the ground that the evidence offered on the part of plaintiff failed to show either malice or want of probable cause. The court granted the motion, and judgment of nonsuit was entered. Motion for a new trial was made and denied, and plaintiff appeals from the judgment and order. It is contended by plaintiff that there was evidence of malice and want of probable cause suffi-

cient to entitle the case to go to the jury. It is incumbent upon the plaintiff, and the burden of proof is upon him, in an action of this kind to prove both malice and want of probable cause. (2 Greenleaf on Evidence, sec. 454; *Potter v. Seale*, 8 Cal. 221; *Grant v. Moore*, 29 Cal. 656; *Anderson v. Coleman*, 53 Cal. 188.) Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. (2 Greenleaf on Evidence, secs. 453-57; *Potter v. Seale*, *supra*; *Smith v. Liverpool etc. Ins. Co.*, 107 Cal. 433.)

Where there is no conflicting testimony the question whether or not the evidence introduced by plaintiff shows want of probable cause is always for the court to decide, and it is error in such case, where there is no proof of want of probable cause, to submit any question to the jury. (*Dwain v. Descalzo*, 66 Cal. 415; *Smith v. Liverpool etc. Ins. Co.*, *supra*.)

It was therefore incumbent on the plaintiff in this case, in order to entitle him to recover, to prove the allegations of his complaint. He alleged that the prosecution was malicious and without probable cause. The primary question was the want of probable cause for the prosecution complained of, and this must have been established by the plaintiff before he could claim the right to have the case go to the jury. It was therefore essential for plaintiff to prove that his arrest and prosecution were not under such circumstances as would justify a suspicion in a reasonable man that the charge was true. Let us examine the facts and determine whether or not they warranted such suspicion. The section of the Penal Code hereinbefore cited makes it a misdemeanor for anyone to maliciously tear down, remove, or injure any line of telegraph. The plaintiff deliberately, with the advice of counsel, for the purpose of testing the law, with the expectation of being arrested, and during the busy hours of the day, cut about a dozen wires of defendant's telegraph line. The circumstances were such that appellant and his attorney (and we suppose they were reasonable men) expected an arrest to follow. The wires were cut in the presence of an employee of defendant. An act is in contemplation of law done maliciously where it is wrongful and is done intentionally. (Pen. Code, sec. 7, subd. 4; *People v. Taylor*, 36 Cal. 257; *People v. Ah Toon*,

68 Cal. 362.) The act of plaintiff in cutting the wires was unlawful, and he knew it to be. He had been so advised by his attorney. In the complaint in this case, which was verified, he alleges that the complaint in the police court charged him with a criminal offense in the willful cutting of telegraph wires. It is not questioned that the wires of defendant had been erected and were being maintained under a franchise from the board of supervisors. It is not claimed that they in any way interfered with the regular use of the highway by the public, nor that they were upon private property. There is no attempt made to show that appellant had any legal authority to cut them. It seems to us that the circumstances were amply sufficient to warrant a reasonable person in the belief that the plaintiff had committed a crime. The fact that he was discharged in the police court is but a circumstance, and in no way convinces us that the charge was without probable cause. This court in *Janin v. London etc. Bank*, 92 Cal. 27, said: "In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference the court may properly refuse to submit the question to a jury." Applying the rule to this case, we do not think there was evidence sufficient to convince a rational, well-constructed mind that there was no probable cause for plaintiff's arrest in the police court. Counsel for plaintiff seem to have apprehended that they had not proved the case as alleged in the complaint because they devote the first half of their brief to arguing that the complaint is sufficient to sustain an action for false imprisonment, and that the evidence should have been submitted to the jury with proper instructions on that issue. We do not think the contention can be maintained. We will take the definition of false imprisonment as given by plaintiff's counsel: "False imprisonment is a trespass committed by one man against the person of another by unlawfully arresting him and detaining him without any legal authority." In order for the complaint to state a cause of action under the above definition, it

would have to show that the defendant unlawfully arrested the plaintiff without legal authority. The complaint not only fails to state that the arrest was unlawful and without legal authority, but states that it was lawful and upon a complaint charging plaintiff with a criminal offense and by a police officer of the city and county. The plaintiff, in order to make out a case of malicious prosecution in his complaint, had to allege that he was arrested by legal process; on the other hand, in an action for false imprisonment he would have to allege that he was arrested without legal authority.

The rule has often been stated by this court that the plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proofs. (*Mondran v. Goux*, 51 Cal. 151; *Evans v. Bailey*, 66 Cal. 113; *Shenandoah etc. Co. v. Morgan*, 103 Cal. 409.) In *Rogers v. Sutton*, 1 Term Rep. 544, decided in 1786, Lord Loughborough, in discussing an action for malicious prosecution, said: "There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal." This rule has always been adhered to, not only in England, but in this country. (*Colter v. Lower*, 35 Ind. 285; *Turpin v. Remy*, 3 Blackf. 210; *Seeger v. Pfeifer*, 35 Ind. 13; *Murphy v. Martin*, 58 Wis. 276; *Elsee v. Smith*, 2 Chit. 304; *Gelzenleuchter v. Niemeyer*, 64 Wis. 321.)

And in the case of *Nebenzahl v. Townsend*, 10 Daly, 235, the court used this language: "The complaint was for false imprisonment and malicious prosecution, which was uniting two causes of action that were inconsistent with each other, for, if the arrest was without lawful authority, it was not a case of malicious prosecution (*Bourden v. Alloway*, 11 Mod. 180); and if under lawful process there was no false imprisonment, the imprisonment being by lawful authority. Each cause of action is distinct from the other. Thus, formerly for false imprisonment the remedy was trespass, and for malicious prosecution it was case. (*Elsee v. Smith*, *supra*.) Both cannot exist upon the same state of facts, or, to put it more clearly, if the one lies upon the facts the other does not."

In this case plaintiff did not attempt in his complaint to state a cause of action for false imprisonment, and we do not think under his pleading that he can make the claim for the first time in this court. We have carefully examined the cases cited by appellant's counsel and find nothing in them in conflict with what has been said. In *Ah Fong v. Sternes*, 79 Cal. 32, the court said: "We think the complaint states a good cause of action for false imprisonment. The allegation that the plaintiff was confined and restrained of his liberty by the defendant is an allegation of physical and bodily restraint, which would serve as a foundation for the old action of trespass *vi et armis*. In such an action it is not necessary to aver—as would be necessary to aver in an action for malicious prosecution—that the imprisonment was malicious or without probable cause." The court evidently recognized the distinction between the two classes of cases. Even if the complaint in this action were sufficient as pleading a cause of action for false imprisonment the evidence would not sustain it.

The arrest was made by Corcoran, an employee of defendant, in whose presence the offense was committed. A private person may arrest another for a public offense committed or attempted in his presence. (Pen. Code, sec. 837.) If the evidence were sufficient to show a false imprisonment we are again met by the objection that the complaint does not allege any restraint of any kind by defendant, but alleges that the defendant procured a police officer to arrest plaintiff. There is no statement as to whether the arrest was with or without a warrant and the presumption of law is that a public officer performed his duty, and in this case the presumption would be that the officer either had a warrant or that the "criminal offense" was committed in the presence of the officer. The allegation of the complaint is "that he was charged with a criminal offense," and in such case plaintiff cannot now claim "that he was not charged with any criminal offense." Being charged with a criminal offense and arrested by a police officer, and nothing being averred to the contrary, it is presumed the officer had the proper warrant.

We advise that the judgment and order be affirmed.

Haynes, C., and Gray, C., concurred.

[Crim. No. 550. In Bank.—December 26, 1899.]

THE PEOPLE, Respondent, v. T. M. GLEASON, Appel-
lant.

CRIMINAL LAW—HOMICIDE—EVIDENCE—CONDITION OF POCKET OF DECEASED—MOTIVE.—Upon the trial of a person accused of murder, evidence is admissible to show the condition of the body of the deceased immediately after the homicide, and that the pocket of the deceased, containing a purse with change in it, was partly turned inside out. The fact that the evidence might tend to show that the motive of the homicide was robbery does not render it inadmissible as tending to show a distinct crime.

ID.—ATTACK OF DECEASED—CROSS-EXAMINATION OF DEFENDANT—FACT OF DISTANCE—OPINION.—Where the defendant had testified that he feared an attack from the deceased with a knife, a question upon cross-examination, based upon the fact of distance testified to by him, as to how the deceased could reach him with the lunge of a knife after stepping up two or three feet from a distance of ten or twelve feet, is not objectionable as improperly asking for the opinion of the witness.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—OPENING STATEMENT—UNPROVED FACTS.—The district attorney is not guilty of misconduct for merely including in his opening statement facts expected to be proved, some of which remained unproved, where there is nothing to indicate an intentional disregard of truth, or clear intent to influence the jury by false statements.

ID.—INSTRUCTION—INCOMPLETE STATEMENT AS TO IMPEACHMENT—INCORRECT PRESUMPTION.—An instruction requested for the defendant, which, so far as correct, consists of commonplace matters well known to the jury, and which contains an incomplete statement of the manner by which the defendant may be impeached, and an incorrect presumption of law as to the good character of the defendant as a witness, in the absence of one kind of impeaching testimony, is properly refused.

APPEAL from a judgment of the Superior Court of Kern County and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

A. J. Bledsoe, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

McFARLAND, J.—The defendant was convicted of the crime of murder in the first degree, and the jury fixed the punishment at imprisonment for life. He appeals from the judgment and from an order denying his motion for a new trial.

The appellant contends that the evidence was not sufficient to justify the jury in finding that the homicide was committed with that degree of premeditation and deliberation which is necessary to constitute murder in the first degree. Upon this point, it is sufficient to say that this contention cannot be maintained, and that the evidence was amply sufficient to warrant the verdict.

Dr. Cook, a witness for the prosecution, testified that immediately after the shooting he made an examination of the body of the deceased, and was allowed to testify over the objection of the appellant that he found in a pocket of the clothing of the deceased a purse with some change in it, and that the pocket was partly turned inside out. Appellant contends that this ruling was an error for which the judgment should be reversed, but we do not think so. It is usual and not improper to show the condition of the body of a deceased party immediately after the commission of the homicide, and, even if it cannot be considered strictly a part of the *res gestae*, still we do not see how it could have been prejudicial to appellant. Even if it tended in some degree to show that robbery was the motive of the assault—and that seems to be the particular objection which appellant makes to it—that consideration would no make the evidence inadmissible. We see no ground for the contention by appellant that the evidence was inadmissible because it tended to prove another and distinct crime.

Appellant having testified on the witness stand that he feared that deceased was about to attack him with a knife, was asked this question: "Now, I ask you how he could reach you after he stepped two or three feet up, from the distance that you first saw him? Ten or twelve feet, how he could reach you with a lunge?" Appellant objected to this question, and contends that it was improperly asking for the opinion of the witness. We do not think that this contention can be maintained; considering the testimony of the appellant in chief, the question was entirely proper; it was not asking for an opinion, but really as to the fact of

distance between the two parties at the time the fatal shot was fired. The prosecuting attorney in his opening statement to the jury mentioned one or two facts which he said he expected to prove, but which he did not prove; and appellant contends that this was such misconduct as calls for a reversal. No objection was made to this during the trial; but, waiving the question whether the point is properly presented here, the contention cannot be maintained. It would be going a great distance to hold that every time a district attorney happens to state in his opening more than he is able to prove the judgment should be reversed for misconduct; and there is nothing in the present case to show such an extreme disregard for the truth and such a clear intent to influence the jury by false statements as would warrant a reversal of the case upon that ground. Usually, such an overstatement is prejudicial to the party making it.

The general charge of the court to the jury is not objected to, and it was certainly as favorable to the appellant as he could have reasonably desired; but he claims a reversal upon the ground that the court refused an instruction asked by appellant, which is as follows: "You are instructed, gentlemen, that where a defendant presents himself as a witness in his own behalf he subjects himself to the same rules of testing or impeaching his credibility before the jury as any other witness; and he may be impeached by the testimony of other witnesses that his general reputation in the community for truth, honor, and integrity is bad. And in the absence of such impeaching testimony the law presumes that the reputation of a witness for truth, honor, and integrity is good." If this instruction had been in all respects a complete statement of the law on the subject to which it refers, still it is doubtful whether the judgment should be reversed on account of the mere failure of the court to give it, for it might, perhaps, be truly said that it contains nothing but mere commonplaces within the general knowledge of jurors. However, when it is sought to reverse a judgment for a refusal to give an instruction asked, the instruction itself must contain a full and correct statement of the law on the subject; and the instruction here in question was not of that character. It is said in the instruction that the appellant might be impeached "by the testimony of other

witnesses" that his general reputation is bad; and it is further said that "in the absence of such impeaching testimony the law presumes," etc. But "such impeaching testimony," that is, the testimony of other witnesses as to a man's general reputation, is not the only means by which a witness may be impeached.

The foregoing are the only reasons urged for a reversal, and they are not sufficient to warrant that result.

The judgment and order appealed from are affirmed.

Temple, J., Garoutte, J., Van Dyke, J., Harrison, J., and Henshaw, J., concurred.

[L. A. No. 585. Department Two.—December 28, 1899.]

P. O. CHILSTROM, Respondent, v. H. EPPINGER, Jr.,
and E. P. CHICK, Appellants.

ASSIGNMENT—JUDGMENT—UNDERTAKING ON APPEAL—RIGHTS OF ASSIGNEE.—The assignment of a judgment only, without the assignment of the undertaking on appeal therefrom, does not pass to the assignee any right of action upon the undertaking on appeal, whether the assignment be made pending the appeal, or after the judgment has become a finality.

ID.—DISTINCT CONTRACT OF SURETIES—ACTION BY ASSIGNEE OF JUDGMENT.—The contract of the sureties in undertaking on appeal and to stay proceedings is distinct from and independent of the judgment, and not a necessary incident to it, and an action thereupon by a mere assignee of the final judgment cannot be sustained.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

G. & A. Webster, and Louis Lamy, for Appellants.

S. M. Swinnerton, for Respondent.

HENSHAW, J.—The action is by the assignee of the judgment to recover on the undertakings given on appeal and given to stay proceedings. A judgment was rendered in

the justice's court in favor of Morgenson, plaintiff, against Grabow, defendant. An appeal was taken and the undertakings here sued upon were given to support it. Before determination of the appeal Morgenson assigned his judgment to P. O. Chilstrom, plaintiff in this action. He made no assignment of his rights upon the undertakings. After the assignment of the judgment the appeal was dismissed, and Chilstrom instituted this action in which he recovered judgment, from which defendants appeal.

In *Moses v. Thorne*, 6 Cal. 87, it was held that, in the absence of an assignment of the undertaking, the assignee of the judgment could not maintain an action against the sureties upon the appeal bond, the reasoning being that the contract of the sureties was entirely distinct from and independent of the judgment, was not a necessary incident to it, and the rights under it did not pass by assignment of the judgment. See, also, *Dray v. Mayer*, 5 Or. 185.) The point is determinative of this appeal, for we can perceive no distinction between a case where the judgment has been assigned after it has become a finality, and the case at bar, where the judgment was assigned pending the determination of the appeal.

The judgment is therefore reversed and the cause remanded.

McFarland, J., and Temple, J., concurred.

[Sac. No. 584. Department Two.—December 29, 1899.]

WILLIAM T. MILLER et al., Respondents, v. J. O. CARLISLE et al., Defendants. J. O. CARLISLE, Appellant.

MECHANICS' LIENS—INVALID CLAIMS OF LIEN—SEVERAL DEMANDS BELOW JURISDICTION—JOINT PERSONAL JUDGMENT.—In an action to foreclose several mechanics' liens, where the demand of each claimant is less than three hundred dollars, if the liens claimed are invalid, and the equity jurisdiction to enforce them fails, the superior court has no jurisdiction to render a personal judgment against the owners of the land. Such judgment, if rendered, must be several and not joint; and the several demands cannot be accumulated for the purpose of jurisdiction. A joint personal judgment in favor of several plaintiffs, for a sum in excess of three hundred dollars, the respective demands being severally less than that sum, cannot be sustained.

APPEAL from an order of the Superior Court of Butte County denying a new trial. John C. Gray, Judge.

The facts are stated in the opinion of the court.

Hudson Grant, for Appellant.

Warren Sexton, for Respondents.

BRITT, C.—The plaintiffs, five in number, united in this action to enforce their several alleged liens for labor done by them, respectively, upon certain mining ground at the instance of the defendants Carlisle and Boggs. Such liens are asserted in virtue of the statute relating to liens of mechanics and others upon real property. (Code Civ. Proc., sec. 1183 et seq.) The demand of each plaintiff is set forth in a separate count of the complaint, and the sum claimed is in each instance less than three hundred dollars, though the aggregate of the several claims is above eleven hundred dollars. After trial the court below made findings declaring, among other things, that “the liens of plaintiffs do not attach to said land,” but that there is due to the plaintiffs from the defendants Carlisle and Boggs personally the sum of six hundred and fifty-two dollars; judgment against said defendants was accordingly entered in favor of the plaintiffs jointly. Carlisle moved for a new trial, which was denied, and he has appealed from the order made in that behalf.

The statute pertaining to this subject provides that “any number of persons claiming liens may join in the same action, and when separate actions are commenced the court may consolidate them.” (Code Civ. Proc., sec. 1195.) Under the constitution, article VI, section 5, the superior court has no jurisdiction in cases at law for the recovery of pecuniary demands below three hundred dollars in amount; and the appellant insists that since the plaintiffs failed to establish their liens, and the sums of money claimed by them are severally less than three hundred dollars, the court should have refused to consider any evidence of the personal liability of defendants, for the reason that the claims against them personally were not within the jurisdiction. The matter is of some importance, since claims of the class here involved are very commonly for less than three hundred dollars, and the holders must proceed in the superior court to enforce their

liens if they proceed for that purpose at all. It is convenient that the jurisdiction to enforce the personal liability of any defendant, although the lien fails, should be upheld in such cases if the constitution permits; we regret that we have not been favored with a brief presenting the views of respondents on the question.

The cumulation of the several claims in one action we take to be a false quantity in the case; if the court has no jurisdiction to render personal judgment under such circumstances on one demand less than three hundred dollars in amount, then the aggregation of any number of simliar, but independent, demands of different plaintiffs cannot confer jurisdiction; for, of course, the judgment, if rendered, must be several in favor of each plaintiff. The cases of *Larrieux v. Crescent City etc. Co.*, 30 La. Ann. 609, and *Louisiana etc. R. R. Co. v. Hopkins*, 33 La. Ann. 806, explained somewhat in *Succession of Justus*, 47 La. Ann. 304, are much in point; and see *Derby v. Stevens*, 64 Cal. 287; *Thomas v. Anderson*, 58 Cal. 99. If, then, Miller, for instance, had sued alone to enforce the lien claimed for the amount due him from defendants—which he alleged to be the sum of two hundred and eight dollars and fifty cents, and which the court found to be one hundred and fifty-eight dollars and eighty cents—the question is whether the court had power, the lien being defeated, to render judgment against defendants personally for the latter sum.

It is in the exercise of its jurisdiction in equity that the superior court entertains suits to enforce the liens of mechanics and others provided for in the present statute. (*Curnow v. Blue Gravel Co.*, 68 Cal. 262; *Brock v. Bruce*, 5 Cal. 279.) In those courts where the sphere of equity remains distinct from that of law, if a complainant fails to establish at the trial the allegations of his bill which, on their face, appear to entitle him to some equitable relief, the rule is to dismiss his suit, although he may prove also that he has a demand cognizable at law; the reason being that the court is without jurisdiction to proceed further. Accordingly, in a suit in a federal circuit court to foreclose a mortgage, made to secure a promissory note, the proof at the trial showed that the mortgage was invalid, and it was held that the court, sitting in equity, had no

power to render judgment for the sum due on the note, and should dismiss the bill without prejudice. (*Dowell v. Mitchell*, 105 U. S. 430.) To similar effect are *Kramer v. Cohn*, 119 U. S. 355; *Rose v. West*, 50 Ga. 474; *Gamage v. Harris*, 79 Me. 531, and cases cited; *Daniell's Chancery Practice*, 6th Am. ed., *555, *630, and notes. Of course, that rule can have no general application under our system, where law and equity are amalgamated and administered in but one form of action and in the same tribunal; with us it is nothing uncommon to render judgment for money due to the lien claimant from a defendant personally liable to him, although the lien itself fails of enforcement. (*Kennedy-Shaw Lumber Co. v. Priet*, 113 Cal. 291; *Lacore v. Leonard*, 45 Cal. 394; *Boisot on Mechanics' Liens*, sec. 653.) But in no such instance to which our observation has extended did it appear that the pecuniary demand involved was less than the court had jurisdiction to consider in an action founded on that alone; and the rule in equity illustrated by *Dowell v. Mitchell*, *supra*, and other cases above cited, is certainly not more peremptory than the provision of the constitution which forbids the superior court to take cognizance of an action at law to recover money less than three hundred dollars in amount. We must hold, therefore, that since the right of the superior court to entertain the present action arose solely from the incident of the liens and the foreclosure asked, then, on proof and findings at the trial that no lien existed, the court was without jurisdiction to give judgment for money against the defendants.

We do not overlook the principle that in ordinary legal actions the so-called *ad damnum* clause of the complaint, when stated in good faith (*Fix v. Sussung*, 83 Mich. 561; 21 Am. St. Rep. 616, and note), affords the test of jurisdiction, and, if the amount equals or exceeds three hundred dollars, the superior court obtains jurisdiction and may render judgment for any lesser sum the evidence may justify. (*Dashiell v. Slingerland*, 60 Cal. 653.) In such case, however, the money demand is the substantive ground of jurisdiction, and the relief allowed does not differ in kind from that prayed for; it is the larger demand which is litigated—not alone the part of it which is recovered. But in the present

case the sum of money involved is not the substantive ground on which the jurisdiction of the superior court rests in any degree; the jurisdiction must be supported, if at all, on a mere incident of the debts claimed by the plaintiffs respectively, viz., the lien and the equitable remedy of foreclosure, and since the lien fails and the court can administer no equitable relief whatever, it must logically follow that the residue of the action—a dispute concerning money less than three hundred dollars in amount—can no longer engage the attention of the court.

It may be added that there was no evidence of any indebtedness of the defendants to the plaintiffs jointly; the findings of the court on which followed the judgment that plaintiffs together recover the sum of six hundred and fifty-two dollars was, therefore, without support.

The order denying a new trial should be reversed.

Cooper, C., and Chipman, C., concurred.

For the reason given in the foregoing opinion the order denying a new trial is reversed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 560. Department Two.—December 29, 1899.]

WILLIAM T. MILLER et al., Respondents, v. J. O. CARLISLE et al., Defendants. PAUL H. BOGGS, Appellant.

MECHANICS' LIENS—INVALID CLAIMS OF LIEN—SEVERAL DEMANDS BELOW JURISDICTION—JOINT PERSONAL JUDGMENT.—A joint personal judgment in excess of three hundred dollars, in favor of several plaintiffs, in an action to enforce mechanics' liens, where the several demands of each lien claimant were less than three hundred dollars, and the claims of lien were found invalid, held erroneous, and not within the jurisdiction of the superior court, upon the authority of *Miller v. Carlisle*, ante, p. 327.

APPEAL from a judgment of the Superior Court of Butte County. John C. Gray, Judge.

The facts are stated in the opinion of the court and in the opinion rendered in the case of *Miller v. Carlisle*, ante, p. 327.

Nicoll & Orr, for Appellant.

Warren Sexton, for Respondents.

THE COURT.—This appeal is by the defendant Boggs from the personal judgment in the action rendered against him and his codefendant Carlisle. The facts necessary to an understanding of the case are stated in the opinion rendered on the appeal (Sac. No. 584, *ante*, p. 327.) from the order denying the motion of Carlisle for new trial. For the reasons there given it appears that the court below had no jurisdiction to render the judgment appealed from; the judgment is also erroneous in that it awards a recovery in favor of the plaintiffs jointly, their demands being several; it is therefore reversed.

[Sac. No. 601. Department Two.—December 29, 1899.]

E. L. BROWNE, Respondent, v. URENA SWEET et al.,
Appellants.

ESTATES OF DECEASED PERSONS—PROPERTY SET APART TO USE OF FAMILY—DISCHARGE OF ADMINISTRATOR—FORECLOSURE OF MORTGAGE—PARTIES.—Where it appears that the whole of the estate of a deceased person has been set apart to the use of the family, subject to encumbrances upon the real estate, under section 1469 of the Code of Civil Procedure, and the administrator has been discharged, he need not be made a party defendant to the foreclosure of a mortgage on the real estate set apart to the family as a homestead.

ID.—MORTGAGE UPON HOMESTEAD—PRESENTATION OF CLAIM—PROBATE HOMESTEAD.—It seems that a mortgage upon a homestead, though declared by the decedent in his lifetime, should not be deemed lost for want of presentation of the claim, where the entire estate was set apart to the use of the family, subject to such mortgage, and no further proceedings were permissible, and no opportunity was allowed for the presentation of claims; but where the mortgage is merely upon a probate homestead set apart for the use of the family, no presentation of the mortgage claim is required.

ID.—PRESUMPTION AGAINST PLEADER—ABSENCE OF AVERMENT—DECLARED HOMESTEAD NOT PRESUMED.—The presumption against the pleader does not warrant the presumption of facts not averred; and an averment in the action to foreclose the mortgage, that the court

set apart the mortgaged property as a homestead, is to be understood as averring a probate homestead, and not a homestead declared by the decedent, which is not averred.

APPEAL from a judgment of the Superior Court of Modoc County. J. W. Harrington, Judge.

The facts are stated in the opinion of the court.

Spencer & Raker, and Clarence A. Raker, for Appellants.

G. F. Harris, for Respondent.

TEMPLE, J.—This appeal is from the judgment which was entered upon overruling defendants' demurrer to the amended complaint, the defendants declining to answer.

The action was to foreclose a mortgage given by one J. R. Sweet to secure his promissory note for the sum of five hundred dollars. In addition to the usual allegations in regard to the mortgage, it is averred in the complaint that J. R. Sweet died intestate on the 4th of October, A. D. 1895, leaving as his only heirs at law his wife, Urena Sweet, and two minor children, to wit, Celia Sweet and Alfred Kenneth Sweet, who are the defendants herein.

It is further alleged that letters of administration were issued upon the estate of J. R. Sweet, deceased, to the defendant Urena Sweet on the twenty-third day of October, 1895, and that thereafter, to wit, on the twenty-third day of April, 1897, "the said Urena Sweet obtained her final discharge as administratrix of said estate, and said estate was settled, and the administration thereof was closed without any provision whatever being made for the payment of said mortgage, and that at this date there is no qualified or acting administrator of said estate."

It is further shown that at no time has there been property or money in the estate which could have been applied to the payment of the debt, and that the estate possessed no assets except the property set apart for the use of the family, and the mortgaged premises.

And, further, that on the seventh day of January, 1896, "the superior court in and for the county of Modoc, by its decree regularly made, set apart said lands described in said

mortgage as a homestead to the defendant in this action," and these defendants are the only persons who have, or claim to have, any interest in said land. Plaintiff waives all claim to a deficiency judgment.

A special demurrer was interposed, which was sufficient to raise the questions presented here.

The first point made is that the administratrix of the estate of J. R. Sweet should have been made a defendant. It appears from the complaint that the entire estate had been regularly set apart to the use of the family of the deceased, either as property exempt from execution, or as a probate homestead, and that the estate had never had other assets. And also that the administration had been closed, and there is now no administrator and no estate which could be administered. The estate of J. R. Sweet, therefore, if it can be said that there is such a thing, could not be interested in the matter.

It is also contended that the mortgage cannot be foreclosed because it is upon the homestead, and it does not appear that it was ever presented to the administratrix for allowance. For this proposition, with other cases, *Bollinger v. Manning*, 79 Cal. 7, is cited as authority. In that case the court found "that there are not now, nor were there ever, any assets . . . that could be charged with or subject to the payment of said note or mortgage." But this court held that, nevertheless, claims secured by liens upon a homestead selected and recorded prior to the death of decedent must be presented as other claims against the estate. The constitution and the laws have created a special tribunal, to wit, the probate court, to marshal the assets of a deceased person, and to determine whether there are assets which can be applied to the payment of debts, and it may well be held that in a suit to foreclose a mortgage the superior court has no jurisdiction to inquire into the matter, however obvious the fact may be: but it does not seem to me that is necessarily so if the probate court has in the proceedings in the estate determined that there never had been in the estate assets which could be applied to the debt. It may be admitted that the legislature could make the requirement general and absolute in all cases. But are we authorized in attributing such a design to the legislature, is the question. Section 1469 of the Code of

Civil Procedure authorizes the probate court in certain cases to assign the entire estate for the use and support of the family, subject to liens and encumbrances, and provides that there must be no further proceedings in the administration. In such case no notice to creditors could be given, and no claims could be presented for allowance. True, this provision may refer to liens upon property other than the homestead, but if a portion of the property thus assigned happened to be a homestead we cannot suppose that it was intended that a creditor should lose his debt for not doing an impossible act. Apparently this estate might have been assigned in that mode, and in effect it was, though, perhaps, not upon the return of the inventory. Whether notice to creditors was ever given does not appear, but the court first set apart for the family all of the personal property, and then set apart the homestead, which comprised all the balance of the estate. It does not appear that the plaintiff ever could have presented his claim. In such case I think we are not warranted in supposing that it was intended that the debt should be lost.

But we are not put to the necessity of determining that question here, for it is not averred in the complaint that the homestead had been selected and declared prior to the death of J. R. Sweet, and there is no presumption that it was. A pleading is to be taken most strongly against the pleader, in that it must be held that a plaintiff has fully stated his cause of action; but this does not warrant us in presuming facts not averred at all. The averment is simply that the court set apart a homestead. If there was no other fact in reference to the matter this was a probate homestead, and in such case a presentation of the mortgage was not required. (*McGahey v. Forrest*, 109 Cal. 63.) The action is not barred by the sections of the code relied upon.

The judgment is affirmed.

Henshaw, J., and McFarland, J., concurred.

[Sac. No. 565. Department Two.—December 29, 1899.]

WILLIAM L. MCGEE, by His Guardian, WARREN W. HASTINGS, Respondent, v. JAMES C. HAYES, Appellant.

GUARDIANSHIP OF INCOMPETENT PERSON—NOTICE OF HEARING—JURISDICTION—VOID APPOINTMENT.—An incompetent person must be served with proper notice, both of the time and place of hearing of an application for guardianship of his person and estate, before the court can acquire jurisdiction to make the appointment. An order and notice specifying merely a day for hearing, without specification of hour or place, is insufficient; and, after an adjournment of the hearing until Tuesday, March 3d, the appointment of a guardian on Tuesday, March 2d, is without jurisdiction and void.

ID.—PRESENCE OF INCOMPETENT PERSON—WAIVER OF NOTICE—CONSENT TO JURISDICTION.—The required presence of the incompetent person at the hearing cannot have the effect to dispense with or waive proper notice of the hearing. He is incapable of consenting to the jurisdiction, and cannot waive any steps necessary to confer jurisdiction upon the court.

ID.—COLLATERAL ATTACK UPON JURISDICTION.—A void appointment of a guardian of an incompetent person, which shows upon the face of the record that the court was without jurisdiction to make the order, is subject to collateral attack in an action brought in the name of the incompetent person by such guardian.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a new trial. Wheaton A. Gray, Judge.

The facts are stated in the opinion of the court.

Shaw & Murry, Hannah & Miller, and Power & Alford, for Appellant.

The appointment of guardian of the incompetent plaintiff was without jurisdiction and void, the statute not having been pursued. (Code Civ. Proc., secs. 1707, 1763; *North v. Joslin*, 59 Mich. 624, 646; *Hart v. Gray*, 3 Sumn. 339; *Palmer v. Oakley*, 2 Doug. 433; 47 Am. Dec. 41; *White v. Pomeroy*, 7 Barb. 640; *In re Winkleman*, 9 Nev. 303; 11 Nev. 87.)

Roth & McFadzean, R. F. Roth, and Charles G. Lamber-
son, for Respondent.

The order appointing the guardian cannot be collaterally attacked for want of proper notice. (*Gronfier v. Puymiol*, 19 Cal. 629; *Warner v. Wilson*, 4 Cal. 310; *Irwin v. Scriber*, 18 Cal. 499.)

THE COURT.—Forcible entry and detainer. Trial by a jury and verdict for plaintiff, and judgment thereon that plaintiff be restored to the possession of the premises. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The verdict was general, "that defendant had been guilty of forcible entry and forcible detainer of the lands described in the complaint, and that plaintiff is entitled to a restitution of the premises."

Appellant claims that the proceedings under which Hastings was appointed guardian were void, because: 1. No citation was ever issued or served; 2. If the order be treated as a citation it is void for the reason that it did not state the time when or the place where the defendant was required to appear; 3. The order was made and entered March 2, 1897, while hearing was set for March 3d. It appears that, upon the petition of Hastings, it was adjudged that McGee "has become an incompetent person, and that it is necessary that a guardian of his estate and person should be appointed," and Hastings was accordingly so appointed. The order recites that he "was duly notified of the time and place of the hearing of the petition heretofore filed herein, and it appearing that the said William L. McGee appeared in person at the hearing of said petition, on this day, and requested that said petition be granted, it is, therefore, ordered," etc. The only citation issued was the order of the judge made on reading and filing the petition in which it was "ordered that Tuesday, the twenty-third day of February, 1897, be and the same is hereby appointed as the time (no place or hour mentioned) for hearing said petition, and it is hereby ordered that notice be given to said William L. McGee of the time and place of hearing said petition," etc. The only notice given or citation served was a copy of this order. On February 23d the court made an order "that the hearing of the aforesaid petition be and the same is hereby continued until Tuesday, March 3, 1897." The order appointing the guardian

is dated March 2, 1897, and is marked "Filed March 2, 1897." The guardian took the oath of office and filed his bond on March 2, 1897, and letters of guardianship were issued to him that day. When these various proceedings were offered in evidence defendant objected to their admission on several specific grounds, challenging their competency, relevancy, and materiality. Respondent contends that the personal presence of the incompetent at the hearing cured any defects in the notice or service of the notice; and that by his presence he consented to the order and waived notice, and that the order so shows on its face. The presence of the incompetent could not supply the requirement of the statute that he should be served with notice of the hearing; he was incapable by reason of his incompetency to consent to the jurisdiction of the court or waive any of the steps necessary to confer jurisdiction upon the court, or to make any request that the petition be granted.

Upon the filing of the petition the court or judge "must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed; and such person, if able to attend, must be produced on the hearing." (Code Civ. Proc., sec. 1763.)

The statute requires the personal presence of the incompetent, if it can be had, as well as that notice of the hearing of the petition be given him. If the order may be treated as a notice, and a copy of it may be served as a notice, it is requisite that it should state the time and place of the hearing. In the present case the order fixed February 23d "as the time for the hearing," but it directed "notice to be given of the time and place of hearing said petition." This direction was not complied with by simply serving a copy of the order in the form given. But if the notice to appear February 23d could be treated as sufficient, and the adjournment of the hearing to March 3d could also be held sufficient, the court had no authority to hear the petition March 2d and make the appointment, as the record shows was done. Counsel for respondent states in his brief, but it does not elsewhere appear, that "the 3d of March, 1897, did not fall upon a Tuesday, but upon a Wednesday, and the hearing of the mat-

ter was intended by the court to be continued to Tuesday, March 2, 1897, on which last-named day the hearing was had." If we were permitted to reject the day of the month named (March 3d) and take the day of the week named (Tuesday), the order would fail to show what Tuesday. There are many Tuesdays in the year, but there is but one March 3d. We do not think we are authorized to reject a definite time and accept one so indefinite. The order was prematurely made and was without authority.

The attack is collateral, it is true, but the proceedings disclose all the steps taken to confer jurisdiction, from which it clearly appears on the face of the record that the court was without jurisdiction to make the order. In such case the order could be attacked collaterally. (*Pioneer Land Co. v. Maddux*, 109 Cal. 633, 640; 50 Am. St. Rep. 67; 1 Freeman on Judgments, sec. 130.)

As plaintiff's right to maintain the action depends upon the authority of the guardian, it follows that the judgment and order denying a new trial should be reversed, and it is so ordered.

[Crim. No. 576. Department Two.—December 29, 1899.]

THE PEOPLE, Respondent, v. K. J. MOONEY, Appellant.

CRIMINAL LAW—ARSON—INTENT TO DESTROY—INSUFFICIENT INFORMATION.—Under section 447 of the Penal Code defining the crime of arson as "the willful and malicious burning of a building with intent to destroy it," the specific intent to destroy the building is an essential ingredient of the offense, and must appear distinctly in the averments of the information, in addition to the averments of willful and malicious burning. An information which merely avers generally that the defendant "did willfully, unlawfully, feloniously, and maliciously set fire to and cause to be burned a certain building," is insufficient to charge the crime of arson.

APPEAL from a judgment of the Superior Court of Merced County and from orders denying a new trial and denying a motion in arrest of judgment. J. R. Webb, Judge.

The facts are stated in the opinion.

James F. Peck, and Frank H. Farrar, for Appellant.

Tirey L. Ford, Attorney General, for Respondent.

GRAY, C.—The defendant appeals from a judgment convicting him of the crime of arson in the second degree, from an order denying him a new trial, and from an order denying his motion in arrest of judgment.

Section 447 of the Penal Code defines arson as “the willful and malicious burning of a building, with intent to destroy it.”

The defendant was charged in the information with “the crime of arson, committed as follows: The said K. J. Mooney on or about the fourth day of March, 1899, at and in the said county of Merced, and state of California, and prior to the filing of this information, did willfully, unlawfully, feloniously, and maliciously set fire to and cause to be burned a certain building occupied and used by said Mooney as a notion store, and situated on Main street in the city of Merced,” etc. It will be seen that one important element of the crime of arson as defined in the code is the “intent to destroy.” The words quoted are a part of the description of the crime of arson, and there can be no such crime in the absence of this intent to destroy. It is therefore necessary that this essential element should be averred in the information, either in the language of the statute or in some other way, so as to make it clearly appear that the defendant had this specific intent and purpose, and that the building was burned by him to carry such intent and purpose into execution. The words “willfully, unlawfully, feloniously, and maliciously” were properly used in the information, but they are not sufficient. Such words import only that criminal intent which is a necessary part of every felony or other crime, but they do not necessarily include the specific purpose to destroy the building which is an element of the crime of arson. “Whether the indictment is on a statute or at the common law, it is a rule, universal and without exception, that every intent, like everything else which the law has made an element of the offense, must be alleged; for otherwise no *prima facie* case appears.” (1 Bishop on Criminal Procedure, sec. 523.) It has been held by this court in a burglary case that the information charging that the intent of the defendant in entering

the building was to commit the crime of felony, without stating what particular felony, does not state the offense of burglary. (*People v. Nelson*, 58 Cal. 104.) In another case the indictment was for perjury, and it was held to be just as necessary to allege therein "that the affidavit was delivered with the intent that it be uttered and published as true, as to charge that the affidavit was made by the accused, or that it was false," and that for want of such allegation the information charged no crime. (*People v. Robles*, 117 Cal. 681.) There is nothing in *People v. Wooley*, 44 Cal. 494, in conflict with the principle laid down in the other cases cited above. The question involved here was not raised or discussed in *People v. Wooley*, *supra*.

The recent case of *People v. Fong Hong*, 120 Cal. 685, cites with approval an instruction of the trial court which accurately sets forth the elements of the crime of arson. It is clear to us that the information in this case does not allege sufficient facts to constitute the crime of arson, and this makes it unnecessary to discuss the other points urged on appeal.

The judgment and orders appealed from should be reversed and the cause remanded.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and orders appealed from are reversed and the cause remanded. Henshaw, J., Temple, J., McFarland, J.

[L. A. No. 595. Department Two.—December 29, 1899.]

CHARLES W. CRUSOE, Respondent, v. J. A. CLARK,
Appellant.

ASSUMPSIT FOR WORK AND LABOR—DEFENSE—JOINT VENTURE TO PROSPECT FOR MINES—EVIDENCE—VARIANCE.—In an action to recover the value of work and labor performed for the defendant as book-keeper, salesman, and clerk, where the answer pleaded as a defense that the work and labor was done under an agreement made prior thereto between plaintiff, defendant, and a third person, to undertake a joint enterprise to prospect for mines, under which defendant and the third person were to do the prospecting and to

share equally with the plaintiff in mineral discoveries, in consideration of his services, in the absence of evidence of the agreement alleged, evidence of a subsequent agreement made after eight months' services had been rendered by the plaintiff, as to future prospecting for mines, is properly excluded, as not being within the issues presented by the pleadings.

ID.—IMPEACHMENT OF WITNESS—CONTRADICTORY STATEMENTS—IRRELEVANT MATTER.—A witness cannot be impeached by contradictory statements as to matters irrelevant to the issues; and it was not error to refuse to permit the plaintiff to be contradicted as a witness by proof that an irrelevant conversation as to future prospecting, which the plaintiff had denied, was in fact had between the plaintiff, the witness, and the defendant.

ID.—CONCLUSION OF WITNESS—UNDERSTANDING OF OTHERS—EXPECTATION OF PLAINTIFF.—Questions asked, calling, not for facts, but for the conclusion of the defendant as a witness, as to what the plaintiff and a third person understood, in reference to the interest of the plaintiff in a prospecting venture, and as to whether the plaintiff expected wages from the defendant, were properly disallowed.

ID.—DISBURSEMENTS IN PROSPECTING VENTURE—PLEADING.—The amount of disbursements made by the defendant in the prospecting venture, in reference to which the pleadings were silent, and upon which there was no issue, is immaterial and not admissible in evidence.

ID.—VALUE OF PLAINTIFF'S SERVICES—QUALIFICATION OF WITNESSES.—Witnesses residing in the county in which the services were rendered by plaintiff, though at a distance from the place where they were rendered, who were in court and heard the evidence of the plaintiff, and who were business men of experience and had employed other persons for like services, and who testified that they knew the value of such work in the county, are qualified to testify to the value of the plaintiff's services.

ID.—BOOKS KEPT BY PLAINTIFF—EVIDENCE FOR DEFENDANT.—The books kept by the plaintiff are admissible in evidence for the defendant upon the issue as to the value of the plaintiff's services, and as tending to explain the nature and extent of his work; and also to prove the amount of monthly sales, oral proof of which by defendant was objected to by plaintiff on the ground that the books were the best evidence. Defendant may also, upon the issue as to the value of plaintiff's services, show by another bookkeeper who has examined such books that they were not complicated, but a simple set of books to keep, and could be kept by any person of ordinary skill in bookkeeping.

ID.—ERROR WITHOUT PREJUDICE—INSUFFICIENT RECORD.—The error in rejecting the books and the evidence relating thereto must be deemed without prejudice, where the record does not show anything about their contents or materiality, or disclose anything

to enable the appellate court to determine whether the error of the superior court was or was not prejudicial.

Id.—INSTRUCTION AS TO BASIS OF VALUE OF SERVICES—PLACE OF EMPLOYMENT—COMPARISON OF WAGES AT OTHER PLACES.—It is not ground for reversal to refuse a requested instruction limiting the consideration of the jury to evidence of the rate of wages generally paid at the particular place of employment in the county, and telling them that the value of services cannot be based in any degree upon wages for like services elsewhere in the county, without first showing that the rate was the same. A comparison may be made even if the wages elsewhere in the county were not the same, which would in some degree tend to show the value of the services at the place where performed.

APPEAL from a judgment of the Superior Court of Kern County and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion.

A. J. Bledsoe, and C. E. Arnold, for Appellant.

S. N. Reed, for Respondent.

CHIPMAN, C.—Action for work and labor as bookkeeper, salesman, and clerk. Defendant denied any indebtedness, pleaded certain counterclaims, and set up an agreement whereby plaintiff, defendant, and one Shurley entered into a joint enterprise to prospect for mines, in the accomplishment of which plaintiff was to take charge of defendant's mercantile business as clerk, bookkeeper, and salesman without pay, and defendant and Shurley were to do the prospecting and share equally with plaintiff in any mineral discoveries. The cause was tried by a jury and plaintiff had a verdict for five hundred and sixty-four dollars and twenty-three cents. Defendant appeals from the judgment and from an order denying new trial.

Certain errors in rejecting the testimony of the witness Shurley are claimed. Some testimony had been given by defendant in support of the agreement pleaded in defense. The alleged agreement was oral, and it was alleged that it was entered into about October 1, 1896. There was no evidence that the three parties to the agreement had met and come to any mutual understanding as to its terms, but it was claimed by defendant that they met in June, 1897, and confirmed the

contract. Plaintiff's services were alleged to have been performed between October 21, 1896, and December 15, 1897. Defendant testified that Shurley went with plaintiff and defendant from Bakersfield to Mojave, but that he, defendant, did not introduce Shurley to plaintiff; that Shurley stayed at Mojave about two weeks; was in ill health and returned to Bakersfield, and returned to the desert about June 20, 1897. Shurley was called as witness for defendant and was asked a number of questions as to what was said at a meeting between the three in June, 1897, "referring to certain prospecting that was to be in contemplation by you and Mr. Clark out on the desert"; he was asked if he had any conversation with plaintiff and defendant "with regard to prospecting for minerals in that country," and to state the conversations. Several questions were asked him by defendant's counsel, all of which related to the understanding after he returned to the desert. The court properly, we think, sustained the objection made by plaintiff. The agreement pleaded was alleged to have been entered into October 1, 1896; there was no agreement pleaded such as Shurley was asked to testify about, and the testimony was therefore not within the issues presented. It did not tend to corroborate defendant's testimony that the agreement took effect October 1, 1896. For like reason it was not error to refuse a question asked Shurley for the purpose of contradicting plaintiff, who had denied a conversation with defendant and Shurley "referring to certain prospecting that was to be." A witness cannot be impeached by contradictory statements as to matters irrelevant to the issues. It was not error to refuse the question put to defendant Clark as a witness, "Did Mr. Shurley and Mr. Crusoe understand that Crusoe, Shurley, and yourself were interested in the matter?" and the question: "State whether or not Mr. Crusoe expected any wages from you when he went out there." Clearly, these were questions calling not for facts, but for the conclusion of the witness and were inadmissible. It was immaterial how much defendant paid out for expenses in the prospecting venture; there was no issue involving such disbursements. It is objected that the testimony of witnesses Parks and Munzer as to the value of plaintiff's services was improperly admitted, because they resided at Bakersfield and admitted

that they did not know what the wages for like services were at Garlock or Mojave, where they were rendered, which were places situated in Kern county remote from Bakersfield. These witnesses were present in court and heard plaintiff describe the nature and extent of his services; they were business men of experience and had employed persons for services similar to those performed by plaintiff; they testified that they knew the value of such work in Kern county. We think they fully qualified themselves to testify upon the point at issue.

Defendant offered in evidence the books kept by plaintiff, to show the character and amount of bookkeeping done by plaintiff and the extent of defendant's business. I think this evidence was admissible upon the issue as to the value of the plaintiff's services. It tended to explain the nature and extent of his work. The court had refused to allow defendant to prove the amount of the monthly sales on the ground that the books were there and were the best evidence, but when they were offered refused to admit them. This was error. The court also refused to allow the witness Broadwell, who was himself a bookkeeper, to testify from an examination of the books that they were not complicated, but a simple set of books to keep, and that anyone of ordinary skill in bookkeeping could keep them. We think this evidence was also admissible, as bearing upon the question of the value of plaintiff's services. It does not, however, appear from any statement of counsel, or otherwise, what the books would have shown, or that their introduction would have furnished evidence material to appellant. It appeared from the offer of Broadwell's testimony that he had examined the books. He testified to the value of plaintiff's services, we must presume, at least in part from this examination. The jury got the benefit, to some extent, in that way, of the rejected evidence. While we think the books ought to have been admitted, and that this witness ought, as an expert bookkeeper, to have been permitted to testify as it was claimed he would, still nothing is shown to enable us to say whether or not the error was prejudicial.

Defendant asked and was refused the following instructions: "That the rule for determining the value of services, in the absence of an express contract therefor, is to ascertain

from the evidence the character and kind of work performed, and the rate of wages generally paid in the same neighborhood for the same kind of work"; and that the value of the services must be ascertained "from the testimony as to the ruling rate of wages for similar services paid at" the place of the service (Garlock and Mojave), and that the estimate of value cannot be based upon the estimate of the value of such services in any degree upon testimony of the rate of wages paid at Bakersfield or elsewhere, "unless it is first shown to your satisfaction that the rate of wages at both places was the same." The value of the services of one who is a bookkeeper, clerk, salesman and has the care and management of the business in the absence of his employer, as was the case here, can hardly be determined alone by the rate of wages generally paid for salesmen or clerks. The value of the services would depend much upon the man himself, as to his capacity and fidelity, as well as upon the customary wages paid for this class of work. While the customary wages might be a criterion, it would not be the only one, as the instruction implies. The services in their nature involve trust and confidence, peculiar fitness as a salesman, skill as an accountant, knowledge of the business, and capacity to manage it. There can hardly be a "ruling rate of wages" for employment of this character applicable alike to all persons who might be employed. Nor do we think it was error to refuse to instruct the jury that the value of the services could not "in any degree" be based upon the wages for like services elsewhere in the county "unless it was shown that the rate of wages elsewhere in the county was the same." A comparison might be made, even if the wages elsewhere were not the same, which would in some degree tend to show the value of the services at the place where performed. In the present case, plaintiff first showed the character and extent of his services, and then proved their value by witnesses who showed by their answers that they were qualified to speak as to the value of the services at the place where performed, and testified that they knew the value and what it was. There was evidence also as to what wages were generally paid for such services, and it is to this latter defendant sought to confine the evidence. We do not think it was prejudicial error to refuse the instructions.

Defendant contends that the evidence was insufficient to sustain the verdict. Upon this point it is enough to say that the evidence was conflicting, that there was sufficient to support the verdict, and that it was for the jury alone to pass upon the credibility of the witnesses.

The judgment and order should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 749. Department Two.—December 29, 1899.]

THE PEOPLE ex rel. BARKER, Appellant, v. JOHN SHAVER, Respondent.

OFFICERS—NOTICE OF ELECTION—CERTIFICATE—TIME FOR QUALIFICATION

—CONSTRUCTION OF CODE.—The "notice of election" provided for in section 907 of the Political Code is to be given by the issuance of the certificate of election provided for in section 1284 of that code, and the time for the qualification of an elected officer is within ten days after the issuance of his certificate of election, or in default of such certificate, within fifteen days after the commencement of his term of office.

ID.—ACTUAL KNOWLEDGE—CANVASS OF RETURNS BY ELECTED SUPERVISOR.

—The actual knowledge of the result of the election cannot dispense with or take the place of the issued certificate of election; and the fact that an elected supervisor, as chairman of the existing board of supervisors, participated in the canvass of the returns of the election, does not affect the time for his qualification for the elected office.

ID.—ABORTIVE ATTEMPT AT QUALIFICATION—FORFEITURE—DUE QUALIFICATION—TITLE TO OFFICE.

—An abortive attempt at qualification by an elected supervisor, by way of anticipation of the notice of election required by law, cannot work a forfeiture of his right; and, if no certificate of election is subsequently issued, a due qualification effected by him within fifteen days from the commencement of his term is sufficient to entitle him to the office.

ID.—INVALID APPOINTMENT BY GOVERNOR.—There being no vacancy in the office of supervisor, an appointment by the governor to that office is invalid, and confers no right.

APPEAL from a judgment of the Superior Court of Riverside County. J. S. Noyes, Judge.

The facts are stated in the opinion of the court.

Tirey L. Ford, Attorney General, W. C. Van Fleet, and John G. North, for Appellant.

Section 907 of the Political Code, providing for qualification within ten days after the officer "has notice of his election," was purposely changed from prior legislation, requiring the oath to be indorsed on the certificate of election. (Hittell's Gen. Laws, secs. 4735, 4739.) This change indicates that the legislature did not intend that the new statute should be the same as the old statute. (23 Am. & Eng. Ency. of Law, 373, note, 2 *United States v. Bashaw*, 50 Fed. Rep. 749, 753, 754.) The defendant could waive any notice intended for his benefit, and did so by his action, making his actual knowledge indisputable. (Civ. Code, sec. 3513; *Payne v. San Francisco*, 3 Cal. 122, 126, 127; *Wall v. Heald*, 95 Cal. 364, 368; *Forni v. Yoell*, 99 Cal. 173, 175-78; *O'Neil v. Donahue*, 57 Cal. 226, 231; *Mullally v. Benevolent Soc.*, 69 Cal. 559, 561, 562; *Gray v. Winder*, 77 Cal. 525; *Dow v. Ross*, 90 Cal. 562; *California Imp. Co. v. Baroteau*, 116 Cal. 136, 138, 139.) The failure of the defendant to qualify in time created a vacancy, which the governor was entitled to fill. (Pol. Code, secs. 907, 947, 996; *People v. Taylor*, 57 Cal. 620; *Lorbeer v. Hutchinson*, 111 Cal. 272; *People v. Shorb*, 100 Cal. 537, 540; 38 Am. St. Rep. 310.)

Thomas T. Porteous, and Purington & Adair, for Respondent.

Provisions for the forfeiture of vested rights are to be construed strictly against the forfeiture (*People v. Perry*, 79 Cal. 112); and the people should not be robbed of their choice of officers, unless a construction rendering the qualification of the elected officer illegal is absolutely necessary. (*State ex rel. Lyons v. Ruff*, 4 Wash. 234.) Section 907 of the Political Code must be construed with section 1284, providing for a certificate of election. An elected officer is not bound to act upon his knowledge of his election, but may await his certificate, or qualify within fifteen days after his term begins, if he has no certificate. (*People v. Perkins*, 85 Cal. 512.)

Notice does not mean knowledge, but information from an authentic source, requiring action. (*In re Central Irr. Dist.*, 117 Cal. 391; *Williams v. Bergin*, 108 Cal. 171.) The certification of the result of the election is the authentic mode for ascertaining the result. (Mecham on Public Officers, 965, 966; *Payne v. San Francisco*, 3 Cal. 122; *State v. Meder*, 22 Nev. 264; *Attorney General v. Elderkin*, 5 Wis. 300; *Kimberlin v. State*, 130 Ind. 120; 30 Am. St. Rep. 208; *People v. Crissey*, 91 N. Y. 616, 627.)

HENSHAW, J.—This action is prosecuted under section 803 of the Code of Civil Procedure to have it declared that the defendant unlawfully holds and exercises the office of supervisor of the fifth supervisor district of Riverside county, and that the relator, Barker, is entitled to the office. The facts are not in dispute. They are the following: The defendant was elected to the office at the general election in 1898. At that time he was a supervisor and the chairman of the board of supervisors of the county. As required by law, the board canvassed the returns of the election, and entered the result in its minutes. Shaver presided as chairman of the board, participated in the canvass and in the action of the board declaring the result, and signed the minutes of the board to that effect. On November 21, 1898, with the purpose and intent of qualifying for the office, he executed and filed an official bond in which it was declared that he had been elected to the office. The bond was insufficient and void. He did not take the oath of office until December 24, 1898, on which date, with the same purpose and intent to qualify for the office of supervisor, he took and subscribed the oath of office, and on December 26, 1898, it was filed in the office of the county clerk. The new term of office commenced upon the second day of January, 1899. Thereafter, on January 5, 1899, Shaver executed and filed an official bond sufficient in form, and took and filed his official oath of office, which was attached to the bond. On March 7, 1899, the governor appointed the relator to fill the vacancy caused by the failure of the defendant to file his official oath and bond within the time required by law. The relator made and filed his official oath and bond within ten days after his appointment.

Upon these facts judgment passed for Shaver. Upon this

appeal it is contended that upon the face of the record it is made to appear that Shaver had actual notice of his election sufficient to meet the requirements of section 907 of the Political Code; that thereupon it became incumbent upon him, under the provision of that section, to take, subscribe, and file his oath of office within ten days; that this admittedly Shaver failed to do. Or, if it was not his duty to act under the notice, still, by acting as evidenced by his abortive attempt to file an undertaking and oath of office, he waived any right which he might otherwise have had to any other notice, and is bound by the result of his own conduct; that in either aspect of the case he forfeited his right to the office to which he had been elected, and a vacancy therein existed, to which the relator was duly appointed, and for which he had duly qualified; that the judgment of the trial court should therefore be reversed, and it should be directed to enter a judgment upon the admitted facts in favor of the relator.

Chapter XI of part III, title II, of the Political Code deals with the canvass of returns in elections, and provides for a meeting of the supervisors for that purpose, for the mode of making the canvass, and for the entering of the result in their minutes, with a declaration of the names of the persons elected. Section 1284 of the Political Code then provides: "The county clerk must immediately make out and deliver to such person . . . a certificate of election signed by him and authenticated with the seal of the superior court." Section 907 of the Political Code provides: "Whenever a different time is not prescribed by law, the oath of office must be taken and subscribed and filed within ten days after the officer has notice of his election or appointment, or before the expiration of fifteen days from the commencement of his term of office when no such notice has been given." The notice here contemplated and provided for is the notice contained in the certificate of election required to be delivered by the county clerk. (*People v. Perkins*, 85 Cal. 512.) Each officer elect is entitled to receive such notice, and actual knowledge will not supply the place of it. The requirement that the county clerk shall issue a certificate, and thus bring notice home to the successful candidate, is something more than a provision designed for his private advantage, and

which may therefore be waived by him at pleasure. It is the mode prescribed for the orderly announcement of the result of an election, and is as much a part of the machinery of the election as are the provisions for the canvassing of the returns and the registration of the result. All are parts of the same scheme, and all are based upon considerations of public policy. (*State v. Meder*, 22 Nev. 264; *People v. North*, 72 N. Y. 128.) No potency attaches to the circumstance that Shaver was chairman of the board of supervisors and signed the minutes, so that, as appellant states, it appears of record that he had notice of the result. The records of the board of supervisors were not designed to charge any person with notice of the result of the election, and should not be held to do so in the case of a member of the board of supervisors, any more than in the case of any other officer elect whose interest and curiosity might prompt him to read them. Each officer was entitled to the notice provided for by law, and could rest secure until such notice was given. Shaver's attempt, admittedly abortive, to anticipate this notice by filing a bond and oath of office, should not be held to work a forfeiture of his right. The notice not having been given, it became the duty of Shaver, under section 907 of the Political Code, to qualify before the expiration of fifteen days from the commencement of his term, and this he did. It resulted therefrom that there was no vacancy in the office.

The judgment appealed from is therefore affirmed.

McFarland, J., and Temple, J., concurred.

[Sac. No. 597. Department Two.—December 29, 1899.]

ENOS COSTA, Respondent, v. JOSEPH SILVA, Appellant.

MINING CLAIM—TENANCY IN COMMON—AGREEMENT TO OBTAIN PATENT—CONTRIBUTION TO EXPENSES—TRUST.—One who bought from a former claimant and paid for one-fourth interest in a mining claim, without taking a deed thereof, and went into possession thereof, and was for many years recognized as a tenant in common by the claimant of the other three-fourths, and who entered into an agreement with such other claimant that they should jointly procure a patent for the mining claim, and contributed toward the

survey and expenses of obtaining a patent, may enforce a trust in a certificate of purchase of the whole mining claim obtained in the name of the other claimant, to the extent of his one-fourth interest in the claim.

Ja.—PAROL EVIDENCE—REQUEST FOR JOINT EXPENDITURES—PAYMENT OF CONSIDERATION—RESULTING TRUST.—Parol evidence that prior to the filing of defendant's application for a patent, defendant asked plaintiff to contribute toward his one-fourth interest, that plaintiff then contributed a certain sum toward the survey, that he had before that bought and paid for his one-fourth interest, which was worked in common with the defendant, and the proceeds divided proportionately, is admissible to show that the title was to be obtained for their common benefit, and to establish a resulting trust in the certificate of purchase to defendant by payment of part of the consideration therefor, and is not objectionable, on the ground of an attempt to prove a contract concerning real estate by parol.

Id.—OPINION EVIDENCE—RECOGNITION OF PLAINTIFF'S INTEREST—STATEMENT OF FACTS—HARMLESS RULING.—The fact that part of the testimony tending to show a recognition by the defendant of plaintiff's one-fourth interest was a mere opinion of the plaintiff as a witness, objection to which was overruled, is not sufficient ground for reversal, where the facts showing such recognition were stated fully by the witness, and were not controverted by the defendant.

FINDINGS—SUFFICIENCY OF EVIDENCE—APPEAL.—Findings contrary to the evidence relating to immaterial matters not necessary to the support of the judgment, which is sustained by other findings of ultimate facts not inconsistent with the immaterial findings assailed, are not prejudicial error, and will be disregarded upon appeal.

APPEAL from a judgment of the Superior Court of Siskiyou County and from an order denying a new trial. J. S. Beard, Judge.

The facts are stated in the opinion of the court.

Warren & Taylor, for Appellant.

Gillis & Tapscott, for Respondent.

THE COURT.—This is an appeal by defendant from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial. The case is here on the judgment-roll and a bill of exceptions. It appears from the unchallenged findings as follows: That about twenty-four

years ago the plaintiff bought a one-fourth interest in a certain mining claim described in the complaint, containing sixty-three and fifty-one one-hundredths acres and paid therefore the sum of four hundred dollars, but took no deed for the same. That both plaintiff and defendant went into possession of said claim and each had a residence thereon, and for a number of years they worked said claim jointly. That during their residence thereon they each cultivated a portion thereof, and that defendant has continued to reside thereon from the time plaintiff first went into possession up to the present time. That a short time prior to the middle of October, 1896, the defendant recognized the one-fourth interest of plaintiff in and to said claim, and then proposed to plaintiff that they take steps to get a patent to said claim jointly; that plaintiff should pay one-fourth of the expenses of getting the patent, and that the defendant should pay three-fourths, to all of which plaintiff agreed. That they then jointly had the said claim surveyed, and plaintiff, at the request of defendant, contributed his services in making the survey, and paid a portion of the expenses thereof. That plaintiff understood that the patent to said claim would be procured in the names of plaintiff and defendant jointly, and they went to the office of their attorneys in Yreka, who had been employed to procure the patent for them, and each paid a portion of the expenses necessary to obtaining said patent. That plaintiff paid toward the expenses of surveying the claim and getting a patent the sum of forty-five dollars. That prior to October, 1896, the defendant made application under the Revised Statutes of the United States to purchase the said claim, and thereafter, about the middle of October, 1896, made final proof in the United States land-office at Redding, in Shasta county, and received a certificate of purchase therefor in his own name. That after the said certificate of purchase was so issued to the defendant, plaintiff demanded of defendant a deed to a one-fourth interest in and to said claim, and defendant then refused, and still refuses, to execute or deliver such deed or any deed to plaintiff.

As conclusions of law, the court found that the defendant holds the undivided one-fourth of said claim in trust for plaintiff, and that plaintiff is entitled to a deed from defendant for said one-fourth interest. A decree was accordingly entered.

We think the above findings support the judgment. The plaintiff, having paid for a one-fourth interest in the property, the defendant for many years having recognized this interest, and the plaintiff finally, in pursuance of the understanding of the parties, having contributed toward the expense of surveying the claim and procuring the title thereto, the title, when procured, was for the benefit of plaintiff, as well as defendant, in proportion to his interest therein. To now allow the defendant, in violation of his agreement, to keep the property for which plaintiff has paid his money and labor would be the most flagrant injustice. If a court, under such circumstances, could not afford relief, it would be a sad commentary upon the law.

The defendant challenges the sufficiency of the evidence to sustain findings 8 and 9 and portions of finding 4. Without passing upon the question as to whether the evidence is sufficient in the respects specified, it clearly appears that the judgment is supported by the findings other than those attacked. While findings 8 and 9 and portions of finding 4 to which our attention is called are not necessary to support the judgment, yet they are not inconsistent or in conflict with the ultimate findings upon which the judgment rests. In such case they may be disregarded. A finding contrary to the evidence upon an immaterial matter is not prejudicial error if the ultimate facts found support the judgment.

Certain questions were asked of the witness Solus and of plaintiff, while a witness upon the stand, for the purpose of showing that in 1896, before the defendant filed his application for the claim, he asked plaintiff to contribute toward his one-fourth interest and help pay for the surveying, and that plaintiff did at that time pay forty dollars toward the survey. The evidence was objected to by defendant upon the ground that it was incompetent, irrelevant, and an attempt to prove a contract concerning real estate by parol. The court overruled the objections, and the rulings are assigned as error. We think the evidence was material, and it was not offered for the purpose of proving a parol agreement to convey land. It was competent for the purpose of showing that plaintiff paid money to defendant at his request and for the purpose of procuring the title for the common benefit of plaintiff and de-

pendant. Where a transfer of real property is made to one person, and the consideration thereof is paid by another, a trust is presumed to result in favor of the person by whom the payment is made. It has always been held competent to prove by parol the payment of the consideration. The plaintiff testified that twenty-four or five years ago he first went to live on the claim. That he worked there mining for three years with defendant. That he had then bought and paid for a one-fourth interest and claimed such interest. That defendant bought his interest one year before plaintiff. The plaintiff was then permitted to testify, under defendant's objection, that they divided the money taken from the mine, that plaintiff received one-fourth of it, and that defendant recognized his one-fourth interest in the mine. Part of the testimony was a mere opinion of the witness, but he stated the facts fully in other parts of his testimony, and we do not think the objectionable part of sufficient importance to make it ground for reversal. The findings concerning which no complaint is made support the judgment. The testimony in the record is without conflict. The defendant did not deny the facts as stated by plaintiff.

The judgment and order are affirmed.

[Sac. No. 577. Department Two.—December 29, 1899.]

JEROME CHURCHILL, Respondent, v. GEORGE R. FLOURNOY et al., Appellants.

ORDER GRANTING NEW TRIAL—DELAY OF HEARING—LACHES—CONSENT PRESUMPTION UPON APPEAL.—Upon appeal from an order granting a new trial, where the record does not show that any objection was made to delay in the hearing of the motion on the ground of apparent laches of the moving party, it will be presumed by this court that the time for the hearing of the motion was extended by consent of the parties.

ID.—STATEMENT—REFERENCE TO MAP TRACING—STIPULATION—PRESUMPTION—CLERK'S CERTIFICATE.—The fact that the engrossed statement contained a direction as to the insertion of a map tracing, which at the trial had been directed to be filed in lieu of a map used in evidence, and that it was not inserted, and does not appear in the transcript, does not show a skeleton statement incon-

sistent with an order granting the motion, where it appears that both parties stipulated that the statement was properly engrossed, and that such stipulation was approved by the judge. It must be presumed in support of the order that the map tracing was properly used upon the hearing; and the clerk's certificate that it was not on file cannot be considered, and has no effect against such presumption.

ID.—PARTIES TO MOTION—SERVICE OF NOTICE—DEATH OF DISCLAIMING DEFENDANT—AUTHORITY OF ATTORNEY—JURISDICTION—AFFIRMANCE OF ORDER.—The death of a disclaiming defendant, in an action involving the title to water, after a judgment in his favor, and before notice of the hearing of a motion for a new trial, revokes the authority of his attorney; and the service of the notice upon his attorney is ineffectual for any purpose, and cannot confer jurisdiction upon the court to grant the motion as to him. But such disclaiming defendant is not a necessary or adverse party to the motion; and the affirmance of an order granting the motion will not have the effect to vacate the judgment in his favor.

ID.—OPINIONS OF TRIAL JUDGE AND OF JUDGE GRANTING NEW TRIAL.—The opinion of the trial judge, whether appearing in the briefs of counsel or in the record, can only be useful to indicate the points involved, and the views of the trial court thereupon, and cannot be considered to affect or change the facts as found; nor can the reasons given in the opinion of the judge granting a new trial control the legal effect of a general order granting the same.

ID.—SUPPORT OF ORDER GRANTING NEW TRIAL.—An order granting a new trial will be affirmed, if it can be justified on any ground made by statute a ground for new trial, which is included in the motion, regardless of the ground on which the court below may have based its order.

ID.—CHANGE OF JUDGE—GENERAL ORDER GRANTING NEW TRIAL—CONFLICTING EVIDENCE—PRESUMPTION.—Where the trial is had before one judge, and the motion for a new trial is passed upon by another judge, the latter stands in the shoes of the former, and has the same power and is charged with the same duty as if the motion had come before the former. If the motion is made upon all the statutory grounds, a general order granting a new trial, made by another judge, is entitled to the same presumption that the court changed its opinion as to the effect of conflicting evidence as if the order were made by the trial judge.

APPEAL from an order of the Superior Court of Lassen County granting a new trial. F. A. Kelley, Judge.

The facts are stated in the opinion.

Goodwin & Goodwin, for Appellants.

Spencer & Raker, and Clarence A. Raker, for Respondent.

CHIPMAN, C.—Action to abate a certain dam and enjoin the diversion of water, with damages. As conclusion of law, the court found that plaintiff was entitled to take nothing by the action and that defendants were entitled to judgment for their costs, and judgment was accordingly entered. The court made an order granting plaintiff's motion for a new trial, from which defendants appeal.

1. Appellants contend that the court abused its discretion in granting the motion upon a record showing laches by the moving party in making his application.

We do not think it necessary to state the facts presented by respondent as accounting for the delay complained of. The record contains nothing to show that appellants, at the hearing of the motion, made the objection now urged.

The code does not prescribe the time within which the application for a new trial shall be heard further than to provide that "it shall be heard at the earliest practicable period after notice of the motion," etc. (Code Civ. Proc., sec. 660.) In *Boggs v. Clark*, 37 Cal. 236, cited by appellants, the plaintiff gave notice of a motion to dismiss defendant's motion for a new trial on the ground that defendant had not presented his motion in reasonable time, and the two motions were heard together. In the present case the objection was made for the first time in this court. We must presume that the time was extended by consent of the parties. (*Patrick v. Morse*, 64 Cal. 462; *Horton v. Jack*, 115 Cal. 29; Hayne on New Trial and Appeal, sec. 145, subd. 3, sec. 146.)

2. It is claimed that the motion was heard on a skeleton statement and should have been denied for that reason. (Citing *Reclamation Dist. v. Hamilton*, 112 Cal. 603, and other cases.) Counsel for plaintiff at the trial offered, without objection, certain portions of a map for the purpose of explaining the evidence given by witnesses. The court stated that counsel would be allowed at any time to remove the map and file a copy. The transcript then reads: "(Here insert tracing of map.)" This map does not appear in the transcript. The cause was tried by Judge Clough of Plumas county, sitting by request of the judge of Modoc county. When the proposed

statement came before him for settlement, it was in the same condition as now with respect to the map; i. e., the tracing had not been inserted. Counsel for both parties, however, stipulated "that the foregoing engrossed statement . . . is true and correct, according to the order settling the same, . . . and ordering that the original statement made by the plaintiff, and the amendments thereto proposed by the defendants, be engrossed as set out in this engrossed statement." Judge Clough, in the order settling the statement, recited the agreement of counsel and proceeded: "And the same having been duly and timely engrossed as directed by the judge, the same is hereby settled and allowed as true and correct." The cause was transferred to Lassen county, before the motion for a new trial was heard, and came before Judge Kelley and was heard without any objection being made by either party that the map referred to in the statement was not engrossed or inserted at the proper place, or referred to or identified. In certifying defendants' supplemental bill of exceptions the clerk added to his certificate a statement that no map was amongst the papers in the action when transferred from Modoc county to Lassen county on August 22, 1896, "and no such map has been received for filing or filed in said court." We do not see how defendants can take advantage of this situation. They stipulated that the engrossed statement was true and correct without the map being inserted. By agreement of the parties the motion was heard with the statement in the condition we now find it, and we must presume, if the court had occasion to consult the map, that it was before the court. We cannot consider the certificate of the clerk that no map was on file, for he had no authority to certify to such fact and his certificate forms no part of the bill of exceptions. But, if we can look to the clerk's certificate, it does not go far enough to rebut the presumption that the map was used at the hearing, although not filed. It may have been used and not filed.

3. It is contended that all the parties necessary to the hearing were not before the court on May 6, 1898, when the court heard the motion, and the court had no jurisdiction to grant the motion.

The contention rests upon the alleged fact that defendant William S. Flournoy, Sr., died on January 4, 1897—about

three months before the motion was noticed to be heard—and that there has been no administration of his estate. Affidavit of the fact was made by defendant J. D. Flournoy October 31, 1898; was served on plaintiff's counsel October 31, 1899, and was filed here November 15, 1899; no motion has been made to substitute any person as the representative of the deceased. Flournoy, Sr., appeared and answered the complaint, but before the trial he, with two other defendants, Painter and Isaac Slippey, withdrew his answer and filed an answer disclaiming all interest in the subject of the controversy, and alleged that all his acts in diverting and using the waters involved were done as the agent of his codefendants William S. Flournoy, Jr., and George R. Flournoy and through their authority. The court made findings as to the defendants who had not disclaimed and found as to Flournoy, Sr., and the other two disclaiming defendants, that they had no interest and claimed none in the water or ditch involved. The judgment, however, is that plaintiff "take nothing as against the defendants . . . and that the defendants do have and recover . . . from plaintiff their, said defendants', costs in this action." The papers of plaintiff on the motion for new trial were served upon and service acknowledged by the attorneys of record for defendants; the order granting the motion recites that it was "duly argued by the respective counsel for litigants and submitted to the court for decision"; on April 28, 1898, the attorneys who appeared for defendants at the trial gave notice of appeal from the order. So far as appears, the same attorneys represented the defendants up to the time the transcript was filed—July 19, 1898. After that date the defendants were represented by Messrs. Goodwin & Goodwin, one of whom was an attorney for defendants at the trial. Respondent brings to our attention some additional facts which tend to show that appellants knew of the death of Flournoy, Sr., before the motion was heard and failed to call attention to the fact that at the hearing of the motion or to notify appellants' counsel until after the transcript was filed here, and showing that respondent had no personal knowledge of Flournoy's death. Respondent claims upon the authority of *Moyle v. Landers*, 78 Cal. 99, that appellants are estopped from raising the point at this time. In the case cited there

was a fraudulent design shown to conceal the death of a party with a purpose to take advantage of the fact in this court. In the case at bar, there is no evidence showing fraud or willful concealment of the death of Flournoy by appellants. It also appears that prior to March, 1895, Flournoy, Sr., conveyed all his interest in the lands and water and ditches involved in the action to one Hershey, and that the action was continued in Flournoy's name with Hershey's consent and with the knowledge of defendant's attorneys. The circumstances are not such as to take the case out of the rule that the death of a party revokes the authority of his attorney, and that service upon the attorney after the death of the party is ineffectual for any purpose. (Hayne on New Trial and Appeal, sec. 210; *Moyle v. Landers*, *supra*; *Pedlar v. Stroud*, 116 Cal. 462.) As to defendant Flournoy, Sr., the court was without jurisdiction to make the order. He was not, however, a necessary party and was not an adverse party, for he disclaimed any interest in the controversy. The case of *Herman v. Menzies*, 115 Cal. 25, 56 Am. St. Rep. 82, cited by appellants, is not in point, for there the party was adverse and was a necessary party to a determination of the issues. We do not think that the affirmance of the order would have the effect to vacate the judgment as to Flournoy, Sr. No exception need therefore be made with reference to him.

4. At the hearing of the motion the plaintiff presented and asked the court to identify and use the opinion rendered by the judge who tried the case in deciding the same. It was received and forms part of the defendants' bill of exceptions. Defendants objected at the time, and now claim that the court erred in its ruling. The opinion of the judge who granted the motion is also made part of the record, from which it appears that he made use of the opinion objected to and based his order, in part at least, upon certain views therein expressed with which he disagreed. The presence of the judge's opinion in the transcript, conceding that it forms no part of the record under section 660 of the Code of Civil Procedure, cannot be prejudicial; the most that can be said is that it entailed needless cost upon appellants in compelling them to print it. It is not unusual for counsel to embody the opinion of the lower court in the briefs, the better to enable

the appellate court to fully comprehend the points involved and the views of the trial court. Whether appearing in the briefs or in the record, however, the opinion cannot be considered to affect or change the facts as found.

5. Although the cause was tried by one judge and the order was made by another judge, the latter possessed the same power and was charged with the same duty as though the motion had come before the former. (*Garton v. Stern*, 121 Cal. 347.)

The failure to find upon a material issue is no ground for granting a new trial. Whether the judgment is authorized by the pleadings or findings is a question not involved in a re-examination of the facts (*Riverside Water Co. v. Gage*, 108 Cal. 240); nor is the trial court authorized to grant a new trial upon the ground that the conclusions, from the facts found, are a decision against law. (*Pierce v. Willis*, 103 Cal. 91.) The examination is limited to a consideration of the sufficiency of the evidence to sustain the findings of fact (*Brison v. Brison*, 90 Cal. 323), and whether any errors of law occurred at the trial. (*Riverside Water Co. v. Gage*, *supra*.)

Plaintiff claimed the right to the waters of Pine creek in Modoc county both as riparian owner of the lands through which the creek runs and as an appropriator of the waters. Plaintiff sought to enjoin defendants from maintaining their dam located in Pine creek, above plaintiff's point of diversion and above his riparian lands, and from diverting the waters of said creek through their ditch leading from said dam, and prayed that the said dam be permanently removed. Defendants state in their brief that they "did not plead title by adverse possession, but merely the bar of the statute to plaintiff's cause of action. The plea was defensive merely, and would not support a judgment for defendants to any amount of water." Nevertheless, defendants' evidence was directed to their prescriptive right by prior appropriation and user for the statutory period and longer. Plaintiff moved upon all the statutory grounds. The record is voluminous, and the briefs discuss with ability and much detail every phase of the case. It is only necessary for us to discover whether any of the grounds are sufficient, for the rule is well settled that the order granting a new trial will be affirmed if it can be justi-

fied on any ground made by statute the subject of a motion for a new trial; and this court is not confined to the ground on which the court below placed its order, for, as was said in *Kauffman v. Maier*, 94 Cal. 269, the court below "cannot by stating in its order (and, we may add, or in its opinion) that the motion is granted upon one ground only, and denied upon the others, deprive the other party of the right to a review by this court of the entire record." (See, also *Haynes v. Fine*, 91 Cal. 391; *In re Kingsley*, 93 Cal. 576.) We are, therefore, not confined to the reasons "expressly set forth" by the judge in his opinion as the grounds on which the motion was granted. Besides, the order itself is general and discloses no grounds upon which it is based. There are sixty-seven separate findings of fact, many of which, if not all of them, are material, and rest upon conflicting evidence. This fact is so manifest from an examination of the opinion of the trial judge and the elaborate briefs of counsel that we deem it unnecessary to specify particulars. It was said in a recent case here: "It is the duty of the judge of the trial court to grant the new trial whenever he is not satisfied with the verdict, if tried by a jury, or with the findings, if tried by the court; and he is not bound by the rule as to conflicting evidence as is this court" (*Condee v. Gyger*, 126 Cal. 546); and it was further therein said: "In support of the order we must presume that the court changed its opinion as to the effect of the evidence and reached a different conclusion upon the hearing of the motion." The same presumptions must be indulged although the motion was heard by a judge who did not try the case. It may be that the judge who tried the case would have adhered to his decision on all points, and that defendants have been placed at a disadvantage by having the motion heard by a judge who could only gain his impressions from the statement, still, the rules of law place him in the shoes of the trial judge clothed with all his powers and duties, and we are not permitted to otherwise regard him or his order made in the case.

We advise that the order be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 577. Department Two.—December 29, 1899.]

THE PEOPLE, Respondent, v. CAL CHILDS, Appellant.

CRIMINAL LAW—GRAND LARCENY—CONSPIRACY—EVIDENCE.—Upon the trial of a defendant charged with grand larceny, which appears to have been committed by aiding and abetting another person in taking the stolen property from the person of the prosecuting witness, it is necessary for the prosecution to show that the two were co-conspirators in the commission of the crime; and evidence that they were seen frequently together is not irrelevant to that issue.

ID.—POSSESSION OF STOLEN GOODS—INSTRUCTION—INAPT EXPRESSION NOT PREJUDICIAL.—An instruction to the effect that the mere possession of stolen goods by the defendant is not sufficient of itself alone to justify his conviction, but that "if there is any other evidence tending to show guilt, taken in connection with the possession of the stolen property, the rule is different," though concluding with an inapt and somewhat ambiguous expression, would be naturally understood by the jury is importing in its conclusion that there might be other evidence which, taken in connection with the circumstance of the possession of stolen property, would be sufficient to convict; and where the charge to the jury was on the whole correct, and favorable to the defendant, the inapt expression, "the rule is different," could not have influenced the jury prejudicially.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Carroll Cook, Judge.

The facts are stated in the opinion of the court, and in the opinion in the case of *People v. Piggott*, 126 Cal. 509.

George D. Collins, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

McFARLAND, J.—The defendant was indicted jointly with one Piggott for the crime of grand larceny. The defendants demanded and had separate trials, and each was convicted as charged. This present appeal is taken by the defendant Childs from the judgment and from an order denying a motion for a new trial. Piggott also appealed, and in his case the judgment and order appealed from have been heretofore affirmed.

Most of the questions raised on this appeal were decided against the contentions of appellants in the said appeal of Piggott, and need not be here further considered. The evidence in this case is slightly different from that in the Piggott case; but the points that the evidence was insufficient to sustain the verdict, and that the court erred in refusing to instruct the jury that there was no evidence against the appellant, are as clearly not maintainable as the same contentions were in the Piggott case.

We observe only two points made here which did not arise in the Piggott case which are necessary to be noticed. The court did not err in permitting the prosecution to show that Childs and Piggott had been frequently seen together on occasions other than the one at which the larceny is alleged to have been committed. The evidence tended to show that Childs committed the larceny by aiding and abetting Piggott in taking the stolen property from the person of the complaining witness. It was necessary, therefore, for the prosecution to show that the defendants were co-conspirators in the commission of the crime; and it cannot be said that the fact of their being seen frequently together was entirely irrelevant, and did not tend in any degree whatever to establish the conspiracy. The other point to be noticed arises upon the contention of appellant that the judgment should be reversed on account of a certain part of the charge of the court to the jury. The court, having instructed the jury that the mere possession of the stolen goods by appellant would not of itself be sufficient to convict him, proceeded as follows: "In other words, no person can be convicted of crime merely by proof of being found in possession of stolen property; the possession of stolen property in and of itself, if there be no other evidence, either circumstantial or direct, would not be sufficient to convict anybody, but if there is any other evidence tending to show guilt, taken in connection with the possession of the stolen property, the rule is different." The last part of this language, to wit, "the rule is different," is an inapt and somewhat ambiguous termination of the sentence; but we do not think that the jury could have been influenced prejudicially to the appellant by the language used. The charge of the court to the jury was on the whole correct and very

favorable to appellant, and we do not think that the language above quoted could have led them astray. A critical examination of the part of the charge in question made afterward by counsel at their leisure, and with full time to closely compare each part of it with the context, may enable them to point out incongruities and even absurdities in the language used; but the jury when hearing it would evidently take it to mean merely that while the possession of stolen goods would not be of itself sufficient to warrant a conviction of a defendant charged with larceny, yet there might be in a case other evidence which, taken in connection with the circumstance of the possession of the stolen property, would be sufficient to convict. Counsel for appellant contends that the court intended to instruct, and did instruct, the jury that the possession of the stolen property would be sufficient to convict a defendant if there was any other evidence at all tending in the slightest degree to show his guilt; but we do not think that this is a correct statement of the meaning of the expression, or that the jury would take it with the meaning ascribed to it by appellant.

The judgment and order appealed from are affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[Sac. No. 711. Department Two.—December 29, 1899.]

A. L. WILLIAMS, Administrator, etc., Respondent, v. P. G. RIEHL et al., Defendants. PATRICK KELLY, Appellant.

BOND OF GUARDIAN—JUDGMENT AGAINST SURETIES—ASSIGNMENT TO PAYING SURETIES—CONSTITUTION—ELECTION OF PROCEDURE.—Part of the sureties upon a guardian's bond, who have paid in full a judgment rendered against the guardian and all of the sureties, to the extent of the liability of each upon the bond, may enforce contribution from the remainder of the sureties, and may, if they choose, proceed against them in the manner provided in section 709 of the Code of Civil Procedure; but they are not compelled to do so, and may, instead, take a written assignment of the judg-

ment from the plaintiff upon payment thereof, and enforce it in his name by execution against each of the other sureties for his proportionate share of the debt, independently of section 709, which is not intended to include the case of such an assignment.

Id.—**ASSIGNMENT TO JUDGMENT DEBTORS.**—The fact that the sureties making the payment to the plaintiff were some of the judgment debtors could not prevent them from taking an assignment of it, for the purpose of enforcing contribution from the other judgment debtors.

Id.—**PAYMENT BY PART OF SURETIES—JUDGMENT NOT SATISFIED—INTENTION OF PARTIES.**—The payment of a judgment by one or more joint debtors does not operate as an accord and satisfaction of the judgment as to other joint judgment debtors, unless it plainly appears that the payment was intended to have such effect; and the payment of a judgment against sureties on a bond by part of them, who, upon such payment, take an assignment of the judgment for the enforcement of contribution against other cosureties, or the principal debtor, cannot operate as a satisfaction of the judgment as against them, nor render the assignment invalid.

Id.—**INDEMNITY FROM PRINCIPAL TO PAYING SURETIES—CONTRIBUTION—EQUALITY OF BURDEN AND BENEFIT.**—Property transferred by the principal debtor to the paying sureties by way of indemnity need not be first exhausted by them before proceeding to enforce contribution against each of the other sureties for his proportionate share of the debt. In such case, equality of burden and of benefit is equity; and the indemnity, whenever enforced, will inure to the benefit of all of the sureties.

Id.—**ENFORCEMENT OF JUDGMENT BY ASSIGNEES—EXECUTION LIMITED TO PROPORTIONATE SHARE OF SURETY.**—The judgment can only be enforced by the assignees against any other surety for aliquot part of the debt, based on the whole number of sureties, and on the legal liability of all the sureties to contribute in the proportion of the respective amounts for which they became surety; and execution cannot be allowed against any surety for an amount in excess of his legal proportion of the debt.

Id.—**PRESUMPTION OF SOLVENCY OF SURETIES—ACTION IN EQUITY.**—The proceeding for the enforcement of the judgment is not in equity, and must be governed by the legal presumption that all of the sureties are solvent. If some of them are in fact insolvent, the sureties may bring their action in equity for contribution, in which the burden may be equally placed upon the solvent sureties.

APPEAL from orders of the Superior Court of Sacramento County denying a motion to satisfy a judgment of record, and to recall and quash a writ of execution for the sum of \$1,875 and costs. Matt F. Johnson, Judge.

The facts are stated in the opinion.

James B. Devine, for Appellant.

Grove L. Johnson, W. M. Sims, Albert M. Johnson, A. J. Hull, and Thomas Watt, for Respondents.

COOPER, C.—The defendant Riehl was the guardian of the estate of one Carver, a minor, and as such guardian executed a bond, as required by the order of the court in which the proceedings were pending, in the penal sum of \$25,000, with the following named sureties for amounts named, respectively, to wit: F. S. Smith, for \$25,000; George Peters, \$5,000; William Johnston, \$5,000; Stanton Myers, \$5,000; Jacob Gebert, \$5,000; D. T. Lufkin, \$5,000, and Patrick Kelly, \$5,000. Carver died, and plaintiff was appointed and qualified as administrator of his estate. The final account of defendant Riehl as such guardian was regularly settled, and it was ascertained by the court that he had in his hands belonging to his ward the sum of \$10,000, with interest, which amount he was directed to pay. The amount not having been paid, the plaintiff brought this action against the defendant Riehl and the other defendants who are sureties on his bond, and on the eleventh day of March, 1898, the plaintiff recovered judgment against defendant Riehl, the guardian, in the sum of \$10,267, and against defendant Smith in the same amount, and against the other defendants in the sum of \$5,000 each. The plaintiff, as administrator of the estate of said Carver, and by permission of the court in which the estate was pending, agreed to accept \$9,500 in full payment of his judgment, and the amount was paid to plaintiff on the twenty-seventh day of April, 1898, by defendants Johnston, Smith, and Lufkin, and at their request the plaintiff executed and delivered to them a written assignment of the judgment authorizing them to enforce the same in the name of the plaintiff as such administrator. This assignment was filed with the clerk of the court and with the papers in this action. After the said assignment was filed the defendants, who paid the judgment and to whom the said assignment was made, applied to the clerk and the the said assignment was made, applied to the clerk and the clerk issued a writ of execution directed to the sheriff of Sacramento county commanding him to levy upon the property

of the defendant Kelly and cause to be made out of the same the sum of \$5,000, besides interests and costs. The sheriff to whom the writ was directed proceeded to levy upon the property of defendant Kelly and noticed the same for sale. Kelly, after giving notice, moved the court below to recall and quash the writ of execution, and for an order directing satisfaction of the judgment to be entered. The court denied the motion and refused to make the order. The court further ordered that the writ of execution be amended so as to run against Kelly for \$1,875 only. The defendant Kelly has appealed from the order so made and from the order refusing to recall the execution.

1. It is claimed by appellant that the defendants Smith, Johnston, and Lufkin, who will hereafter be called the respondents, having failed to comply with the provisions of section 709 of the Code of Civil Procedure, cannot proceed under the judgment by obtaining an execution thereon to enforce contribution from him. The section is as follows: "When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal; in such case, the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution or repayment. Upon a filing of such notice the clerk must make an entry thereof in the margin of the docket."

Respondents do not claim to have complied with said section as to filing with the clerk of the court the notice as therein provided, or as to having an entry made in the margin of the docket, but they claim that, independent of said section, by virtue of the written assignment to them of the judgment, they have the right to an execution to enforce

contribution from the appellant. We think the contention of respondents as to this point correct. The section is somewhat obscure, and the first part of it, down to the word "principal," only lays down fundamental rules as to the rights of sureties and joint judgment debtors to compel contribution. The latter part of the section, "in such case the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if within ten days," etc., is the portion that contemplates giving to sureties or joint judgment debtors the right to an execution in the original proceedings. The section was, no doubt, enacted for the benefit of sureties and joint judgment debtors in order to enable them, without bringing an action, to use the judgment and the writs of the court for the purpose of compelling, in the case of sureties, the repayment from their principal, or contribution from cosureties, and, in case of joint judgment debtors, contribution from their codebtors.

The legislature evidently did not have in mind a case where the parties paying the judgment procured a written assignment of it. The plaintiff, being the owner of the judgment, had the right to assign it to anyone upon payment of the amount authorized by the order of the court in which the estate was pending. The fact that the parties paying it were some of the judgment debtors would not prevent them from taking an assignment of it. The section is substantially the same and in almost the exact words of section 480 of the Civil Code of Kansas. The supreme court of that state, in *Harris v. Frank*, 29 Kan. 203, has placed a similar construction upon section 480 of its code. In the opinion it is said: "Besides, said section 480 of the Civil Code was not enacted for the purpose of giving assignees of judgments a remedy as assignees. They have a remedy independent of such section, and could enforce their judgment if such section had never been enacted. Said section was really enacted for the benefit of sureties, and for the benefit of joint judgment debtors, without reference to whether any assignment had been made or not."

The cases of *Davis v. Heimbach*, 75 Cal. 261, and *Clark v. Austin*, 96 Cal. 283, are not in conflict with what has here been said. In neither case was there any assignment of the judgment to the parties seeking to enforce contribution.

2. The payment of the judgment by respondents to plaintiff did not amount to a satisfaction of the same as against their cosurities or the principal. The rule is, that the mere payment of a judgment by one joint debtor does not operate as an accord and satisfaction of the judgment as to other joint judgment debtors, unless it plainly appears that the payment was intended to have such effect. (Brandt on Suretyship and Guaranty, sec. 275; *Brown v. White*, 29 N. J. L. 514; 80 Am. Dec. 226; *Coffee v. Tevis*, 17 Cal. 239; Freeman on Executions, sec. 444.)

3. The affidavit of appellant used on the motion states on information and belief that, prior to the issuance of the execution, the defendant Riehl transferred to respondents real and personal property of the value of \$5,000, which they had and held in their possession at the time of the hearing of the motion. It is further stated in the affidavit on information and belief that the said real and personal property was so transferred in part payment of the \$9,500, but it is not stated as to whether any price was agreed upon or as to the amount of the \$9,500 the transfer would pay. We must, therefore, from the record, presume that the transfer was of real and personal property, to be held as indemnity to the extent of its value.

There is a sharp conflict in the authorities as to whether a surety holding in his hands indemnity can maintain an action against his cosurety regardless of the indemnity. Many authorities hold that the surety may maintain an action against his cosurety for the sum he is then entitled to, regardless of the indemnity. That in such case, whatever may be afterward received by a sale of the indemnity shall be accounted for and proportionately paid to the sureties. On the other hand, it has been held in several cases that the surety so indemnified must save himself harmless or fully account for the value of the indemnity before he can recover against his cosurety in an action for contribution. The question does not appear to have been decided by this court, and we are at liberty to lay down the rule in this case. We think the first the better rule. Equality is equity. The moment one cosurety or joint judgment debtor pays the debt of his principal he has a right to recover from his cosurety or joint judgment debtor his proportionate share. The law gives him

this right and also imposes upon his cosurety the duty of paying his proportionate share. The obligation is as binding upon the cosurety as if created by promissory note or contract. It would be no defense for a defendant, when sued upon a promissory note or other written contract, to set up that the plaintiff held collateral securities or property for the purpose of indemnifying himself. Why should it be a defense in this kind of an action? Why should the plaintiff, in an action for contribution, after having paid out his money, be compelled to wait until he can realize upon some collateral indemnity which may require years, while his cosurety, who was as much bound in law and morals as himself by the bond, has paid nothing? This would not make the burdens of the cosureties equal. The indemnity is for the benefit of one cosurety as much as for the other, no matter which holds it. (Civ. Code, sec. 2849.) Either one could apply to the court for its sale, or to enjoin a wrongful disposition of it. The burden of finding a market for it and applying its value toward the debt of the principal should be borne by one as well as the other. There is no reason why the cosurety who has paid the debt of his principal should assume the burden of disposing of the indemnity, and the additional burden of waiting until it is disposed of, before he can receive from his cosurety his proportion. The views we have here given are supported by the following authorities: Brandt on Suretyship and Guaranty, sec. 274; *Paulin v. Kaighn*, 29 N. J. L. 483; *Anthony v. Percifull*, 8 Ark. 495; *Bachelder v. Fiske*, 17 Mass. 464; *Johnson v. Vaughn*, 65 Ill. 425.

4. Appellant contends that the execution as modified was for too great a sum, and in this we think he is correct. The respondents, by paying the plaintiff and taking an assignment of the judgment, only became entitled to use it for the purpose of enforcing contribution from their cosureties or payment from their principal. They were only subrogated to the rights of the plaintiff for the purpose of using the judgment in order to protect themselves and their cosureties, and for the purpose of compelling contribution. This is not a proceeding in equity and no claim is made that any cosurety is insolvent. The law presumes that they are solvent. Respondents, therefore, were entitled to execution against ap-

pellant for an aliquot part of the debt based on the whole number of cosureties. They are liable to contribute in the proportion of the respective amounts or penalties for which they became surety. (Brandt on Suretyship and Guaranty, sec. 288; *Armitage v. Pulver*, 37 N. Y. 499; notes to *Deering v. Earl of Winchelsea*, 1 White & Tudor's Lead. Cas. Eq., pt. 1, p. 124, et seq.; *Cowell v. Edwards*, 2 Bos. & P. 268.) Applying this rule the appellant was responsible for one-eleventh of the \$9,500, which is \$863.63. If the other sureties are insolvent, or if any one of them is insolvent, the respondents can bring their action for contribution and all matters can be determined so that justice will be done and the burden equally placed upon the solvent sureties.

We advise that the court below be directed to amend and modify its order so that it direct the writ of execution to run against appellant for \$863.63, and interest at the legal rate since the twenty-seventh day of April, 1898, and for costs, and that as so amended and modified it be affirmed.

Britt, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the court below is directed to amend and modify its order so that it direct the writ of execution to run against appellant for \$863.63, and interest at the legal rate since the twenty-seventh day of April, 1898, and for costs, and that as so amended and modified it is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 551. Department Two.—December 29, 1899.]

THE PEOPLE, Respondent, v. JESSE E. HAWKINS, Appellant.

CRIMINAL LAW—TRIAL AFTER SIXTY DAYS—DISMISSAL—WAIVER BY DEFENDANT.—No duty is incumbent on the court to order the dismissal of a criminal charge under section 1382 of the Penal Code, on the ground that a defendant whose trial has not been postponed upon his application is not brought to trial within sixty days after the finding of an indictment, or the filing of an information, unless the defendant demands such dismissal. The right

of the defendant to demand such dismissal may be waived by him, and is waived, where the defendant is brought to trial by the impaneling and swearing of a jury to try the case, without previous objection that the sixty day limit had expired.

ID.—IMPANELING OF JURY PART OF TRIAL—JEOPARDY.—The impaneling of the jury is a part of the trial, and the defendant is on trial, and his legal jeopardy attaches, when the jury has been impaneled and sworn to try the case; and he cannot then object for the first time that the trial is too late.

ID.—ASSAULT WITH DEADLY WEAPON—EVIDENCE—ATTEMPT AT VIOLENCE—QUESTION FOR JURY.—Where the evidence tends to indicate an attempt at violence by the defendant in the use of a deadly weapon, the question is properly left to the jury, and its verdict of guilty of an assault with a deadly weapon will not be disturbed upon appeal.

ID.—RESISTANCE OF ARREST.—Where it is clear that the defendant knew that an officer, called in for the purpose of arrest, shortly after the assault, intended to arrest him, although the officer did not in words inform him of such intention, evidence that the defendant, with force and arms, resisted the arrest is admissible for the prosecution.

ID.—ASSAULT WITH INTENT TO MURDER—HARMLESS OMISSION IN REQUESTED INSTRUCTION—ACQUITTAL OF CHARGE.—Where a defendant charged with an assault with intent to murder was convicted of an assault with a deadly weapon, and thereby acquitted of the charge of an intent to murder, any alleged error in omitting part of a requested instruction upon that charge is harmless, and cannot have prejudiced the defendant.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a new trial. W. B. Wallace, Judge, presiding.

The facts are stated in the opinion.

Forest L. Alford, and E. W. Holland, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

BRITT, C.—1. On December 2, 1898, an information was filed by the district attorney in the court below accusing defendant of the crime of assault with intent to murder, specifying also that the assault was committed with a deadly weapon. Section 1382 of the Penal Code contains the following provision: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in

the following cases: 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information." January 13, 1899, the court made an order setting defendant's case for trial on February 3d, following. On said February 3d defendant was present in court with his counsel and announced that he was ready for trial; a jury was then impaneled and sworn to try the case; whereupon defendant moved the court to dismiss the action and to discharge him, on the ground that he had not been brought to trial within sixty days after the information was filed. The court denied the motion; the trial proceeded and resulted in a verdict of guilty of an assault with a deadly weapon, upon which sentence of imprisonment was pronounced.

There is no duty incumbent on the court to order dismissal under said section 1382 unless the defendant demands it (*Ex part Fennessy*, 54 Cal. 101); so that the right, like other statutory privileges of the accused which do not affect the jurisdiction of the court, may be waived. It is well settled that the impaneling of the jury is part of a trial (*Silcox v. Lang*, 78 Cal. 118); the legal jeopardy of the defendant has attached when a jury has been "charged with his deliverance," and the jury stands thus charged when its members have been impaneled and sworn. (Cooley's Constitutional Limitations, 6th ed., 399.) When, therefore, the defendant here moved for dismissal he had been "brought to trial," and was upon trial, without previous objection that the limit of sixty days had expired. If he could then raise the objection for the first time, he could raise it as well on the announcement of the verdict, or at any other stage of the trial. We are satisfied that the statute never was designed for such uses, and must hold that defendant waived its benefit (if he was entitled thereto) by failure to claim it in proper season. The following cases tend to sustain this conclusion: *People v. Bennett*, 114 Cal. 56, 58; *Polack v. Gurnee*, 66 Cal. 266; *People v. Romero*, 18 Cal. 89; *People v. Johnson*, 104 Cal. 418.

2. It is claimed that the evidence did not justify the verdict, chiefly, it seems, on the assumed ground that an attempt at actual violence was not proved. There was testimony for the

prosecution tending to show the following circumstances: The person assaulted was a girl about sixteen years of age who was employed as a domestic at the house of defendant's mother, where also defendant resided. Defendant was enamored of the girl, and she had accepted some attentions from another man; defendant, inflamed with jealousy and probably with liquor, caused the girl on a frivolous pretext to arise from bed and dress herself about the hour of 12, midnight, and come to him in an adjacent room. He told her "to say her last blessing," at the same time drawing a dirk knife and making a motion with it toward her; she seized his hand holding the dirk and begged him not to touch her; at this instant defendant's mother rushed screaming into the room and laid hold of him; other persons in the house were aroused and came in and tried to pacify the defendant; he said he would "die the death of a murderer; would die before the sun rises; would meet the girl in heaven before morning." A constable was summoned, and defendant with force and arms resisted arrest. It is plain that this evidence, which was given at the trial with much elaboration of detail, made a question for the jury whether defendant had attempted violence with the weapon upon the prosecuting witness, and that it sustains the verdict.

3. It is argued that the court erred in allowing evidence of the conduct of defendant at the time of his arrest, which followed a few minutes—possibly half an hour—after the assault. The only plausible ground advanced for this objection is that the officer did not state to defendant that his purpose was to arrest him. It seems unnecessary to set out the evidence on this point; although the officer did not in words inform defendant that he intended to arrest him, yet it is perfectly clear that defendant knew such to be his design. The evidence objected to was rightly admitted. (*People v. Ah Fook*, 64 Cal. 380; *People v. Fredericks*, 106 Cal. 554.)

4. Defendant requested the court to instruct the jury in substance that before he could be convicted of an assault with intent to murder it must appear that he had such intent and attempted to carry it into effect, "and was only prevented from so doing by some interposition not of his own will." The court gave the instruction, and much more of similar import, omitting, however, the words which we have quoted.

Defendant claims that the court erred in striking those words words from the charge; it is sufficient to say in this behalf that since the jury found him guilty of an assault with a deadly weapon only, thus acquitting him of any intent to kill, it is impossible that he was injured by failure to instruct on the means by which he was prevented from effectuating an intent which he never had.

There is no material error in the record, and the judgment and order denying a new trial should be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial should be affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 566. Department Two.—December 29, 1899.]

THE PEOPLE, Respondent, v. FRANK OLIVERIA, Jr.,
Appellant.

CRIMINAL LAW—PLEADING—NAME OF DEFENDANT—IMMATERIAL OMISION OF "JR."—An information entitled and indorsed in the name of the people against "F. O., Jr.," which in the charging part avers that "the said F. O." committed the offense charged, and concludes that "all of the acts of the said F. O., Jr., were and are contrary to the statute," etc., sufficiently shows that the defendant was charged by the name of "F. O., Jr.," which he declared to be his true name; and there is no defect in the charging part of the information affecting a substantial right of the defendant.

ID.—JUNIOR AND SENIOR NO PART OF NAME.—Junior and senior are no part of a name, however commonly employed; and neither the omission nor the insertion of either, contrary to what would be deemed proper, will create a variance or otherwise injure the indictment or information.

ID.—IMPANELMENT OF JURY—WITHDRAWAL OF NAMES BY CONSENT—SPECIAL VENIRE—WAIVER OF OBJECTION—CHALLENGE TO SWORN PANEL.—Where the names of six jurors engaged in another trial were withdrawn from the jury-box by consent of the defendant, and after the remainder of the names were exhausted without completing the panel a special venire was summoned, and the jury completed and sworn, without any statutory challenge having been

interposed to the special venire, a challenge subsequently made to the sworn panel by the defendant, on the ground stated "that there were not in the box at the commencement of the drawing, or at any time during the drawing, the full number of names that should be there during the drawing," was properly denied.

ID.—TIME FOR CHALLENGE TO PANEL.—A challenge to the panel must be taken before a juror is sworn.

ID.—ROBBERY—EVIDENCE—IDENTIFICATION OF DEFENDANT—STANDING UP FOR COMPARISON.—Upon a charge of robbery, where the prosecuting witness described the size of the party robbing him, it is not error for the court to overrule an objection to a request of the district attorney that the defendant should stand up for comparison. It would not be error for the court to compel the defendant to stand up for comparison.

ID.—CONFESSION OF DEFENDANT—EVIDENCE OF VOLUNTARINESS—CONFLICTING EVIDENCE OF DEFENDANT.—The confessions of the defendant are admissible for the prosecution, if the evidence for the prosecution shows that they were free and voluntary, and not made under the influence of any threats, intimidations, promises, or inducements of any kind. The fact that the evidence of the defendant conflicts with that for the prosecution cannot justify the exclusion of the evidence of his confessions; but the jury, under proper instructions, are the sole judges of the credibility of the witnesses in regard to the matter.

ID.—DRUNKENNESS OF THE DEFENDANT—INSTRUCTIONS—ABSENCE OF REQUEST.—Where there was evidence indicating that the defendant was drunk at the time of the commission of the offense, and no error is alleged in the instructions given on that subject, the defendant cannot object that further instructions were not given in relation thereto, in the absence of a request made therefor by the defendant.

ID.—REPROVING REMARKS BY JUDGE TO DEFENDANT'S COUNSEL.—Reproving remarks by the judge to the defendant's counsel, though not courteously addressed, are not reversible error, where the manner of the counsel in asking and repeating many immaterial questions merited some rebuke, and tried the patience of the judge.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. W. E. Greene, Judge.

The facts are stated in the opinion.

Sawyer & Bennett, for Appellant.

Tirey L. Ford, Attorney General, C. N. Post, Assistant Attorney General, J. J. Allen, District Attorney, and Henry A. Melvin, Deputy District Attorney, for Respondent.

COOPER, C.—Appeal from judgment and order denying motion for new trial. Defendant was charged with the crime of robbery, committed on the eleventh day of December, 1898, in the county of Alameda, by forcibly taking from the person of one Joseph Nevis one hundred and eighty dollars in gold coin. He entered his plea of “not guilty,” and, after trial before a jury, was convicted and sentenced to a term of three years in the state prison at San Quentin. He does not claim that the evidence is insufficient to justify the verdict, nor that the court erred in giving or refusing any instruction to the jury. He specifies certain alleged errors which he claims are prejudicial, and which we will notice in the order presented. It is claimed that the information charges the defendant under the name of Frank Oliveria, and that the evidence shows that the name of defendant is Frank Oliveria, Jr., and that defendant objected to the evidence on the ground of such variance. The information is entitled “People of the State of California against Frank Oliveria, Jr.” In the charging part it is stated: “The said Frank Oliveria on the eleventh day of,” etc., and concludes by stating: “And all of the acts of the said Frank Oliveria, Jr., in the premises were and are contrary to the form, force, and effect of the statute in such cases made and provided and against the peace and dignity of the people of the state of California.” The information was indorsed on the back thereof, “People of the State of California against Frank Oliveria, Jr.” When it was read to defendant with its indorsements, and he was asked his true name, he answered that his true name “is Frank Oliveria, Jr.” We think it sufficiently appears from the whole information that the defendant was charged under the name of “Frank Oliveria, Jr.” The Penal Code, section 959, provides: “The indictment or information is sufficient if it can be understood therefrom: . . . 3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury or district attorney, as the case may be, unknown.”

Section 960 provides: “No indictment or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits.”

In *San Francisco v. Randall*, 54 Cal. 410, it is said: "The addition 'Jr.' is no part of a name proper," and it was accordingly held that where in one proceeding "Jr." was used, and in another it was not, that it was wholly immaterial.

In *People v. Boggs*, 20 Cal. 433, the indictment was against James B. Boggs and the verdict was against "defendant J. M. Boggs." It was held that the error was immaterial. (See *People v. Ah Kim*, 34 Cal. 189; *People v. Hughes*, 29 Cal. 262.) In 1 Bishop's New Criminal Procedure, section 687, it is said: "Junior and senior are no part of a name, however commonly employed. So that neither the omission nor insertion of either, contrary to what would be deemed proper, will create a variance or otherwise injure the indictment." The text is supported by many cases cited in the footnote at page 407.

It is claimed that the court erred in overruling a challenge to the panel of jurors. It appeared during the drawing of the jury that a part of the regular panel of jurors, six in number, had been called in another department of the superior court in a case on trial in such other department, and for this reason did not answer to their names when called. The clerk informed the judge of the court that there were six names in the box at the time of the commencement of the drawing of the jury who were engaged in the trial of a case in another department of the court. The judge, addressing defendant's counsel, said: "Now, gentlemen, we will take this jury out of the box, take those six names out of the box and draw again, or proceed as we have proceeded up to this point as you please, addressing myself now to the defense. What is your pleasure about it? When we commenced to draw the jury for this case there were the names of six jurors who were engaged in another department on a jury trying a case. Obviously, those names ought not to have been in the box. We will take them out of the box and commence to draw again or go on with the trial, as you please."

The attorneys for defendant answered: "I think we would rather have them taken out of the box." After some further remarks the judge said to defendant's counsel: "What I want to do is simply to give you an opportunity to have a full panel drawn without those names in the box. I understand you, therefore, to waive any informality up to

this point." Counsel for defendant answered: "Yes." No objection or exception appears in the record up to this point to the regular panel, or to taking six jurors out of the box. After the regular panel was exhausted, the court ordered a special venire to issue for eight jurors. No objection or exception was taken to the special panel before the jurors were sworn, the jurors were examined, the jury completed, and all sworn to try the cause. After the jury had been sworn, the defendant's counsel challenged the panel on the ground "that there was not in the box at the commencement of the drawing, or at, and at any time during, the drawing, the full number of names that should be there during the drawing." The court denied the challenge, and defendant excepted. We think the challenge was properly denied. It did not appear whether the challenge was to the regular panel or to the panel returned on the special venire, or to both panels. If it was the intent to challenge the regular panel, the defendant had expressly waived any irregularity in that regard. If the intent was to interpose a challenge to the panel called on the special venire, this could only be done on account of the bias of the officer who summoned them, which would have been good ground of challenge to a juror. (Pen. Code, sec. 1064; *People v. Durrant*, 116 Cal. 195, and cases cited.)

Whether the intent was to interpose a challenge to either panel, or to both, it must have been taken before a juror was sworn. (Pen. Code, sec. 1060.)

While the witness Nevis was testifying, he referred to one of the parties who robbed him as a little man about five feet high, more or less. The district attorney then said: "How did this size compare with this defendant's? Will you stand up, Mr. Oliveria" (speaking to defendant). Counsel for defendant said: "We object to this question and to his, the defendant's, standing up, on the grounds that it is immaterial, incompetent, and irrelevant." The court overruled the objection, and defendant excepted and now claims in his brief that it was error to make the defendant stand up and thereby testify against himself. The record only shows that the district attorney asked defendant to stand up. It does not show that the judge told him to stand up or that he did stand up. But if it were disclosed by the record that he was

compelled by the court to stand up for comparison this would not be error. (*People v. Goldenson*, 76 Cal. 347.)

The confessions of the defendant to the effect that he was guilty of the crime, and that he assisted in forcibly taking the money from Nevis, were admitted in evidence. Defendant claims that such confessions were not free and voluntary, and were made under the inducement of a promise that it would go easier with him if he would confess. Three witnesses for the prosecution testified to the effect that the confessions were voluntary on the part of defendant, and not made under the influence of threats, intimidations, promises, or inducements of any kind. It was attempted by defendant's own testimony to show that promises were made to him that it would be made easier for him if he would confess. We do not think the defendant's evidence clearly shows any such promises, but, if it did, the jury, under proper instructions from the court, were the sole judges of the credibility of the witnesses in regard to the matter. It would be a strange rule that would allow the confessions of a defendant to be given in evidence upon clear proof that they were made voluntarily and without any promise, threat, or inducement, and then allow them to be stricken out upon the defendant testifying that they were made under the fear of a threat or the influence of a promise. If such were the law, it would always lie in the power of a defendant to clear away from the case all confessions by his own evidence, and this regardless of the truth of such testimony. It is said that defendant was drunk at the time of the commission of the offense, and that the court erred in not instructing the jury fully as to drunkenness. The court of its own volition, and we think correctly, in its charge to the jury stated pretty fully the law as to voluntary intoxication in criminal cases. No error is alleged as to the giving of the instruction. It may not have been as full a treatise on the law of drunkenness as defendant desired, but it certainly covered the law pertinent to the evidence in this case. Defendant does not complain of the refusal of the court to give any instruction asked by him. If he desired an instruction containing a correct rule of law upon the evidence and pertinent to the case he should have asked it, and, if it had been refused, assign such refusal as error. The failure of the court to instruct the jury upon any

proposition deemed essential by the defendant is not error, unless he made a request for such instruction. (*People v. Fice*, 97 Cal. 460.)

The remark made by the judge to defendant's counsel during the progress of the trial is not reversible error. The manner of counsel in asking many apparently immaterial questions and repeating them seems to have exhausted the patience of the judge and to have merited at least some rebuke. The language used by the judge in addressing counsel evidently was not that of a Chesterfield. The same thing probably could have been said in language more courteous and with more regard to feelings of counsel; yet we do not think the remark was such as to have prejudiced the rights of the defendant.

The judgment and order should be affirmed.

Britt, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Henshaw, J., Temple, J.

[S. F. No. 1997. Department Two.—December 29, 1899.]

E. CADENASSO et al., Respondents, v. J. S. ANTONELE et al., Defendants. A. D. TURNER and J. L. VERMEIL, Appellants.

PRINCIPAL AND SURETY—RIGHTS OF SURETIES UPON BOND.—Sureties upon a bond to secure the performance of a contract by the principal are entitled to stand upon the precise terms of the bond, and are not bound beyond its strict letter.

ID.—BOND FOR CONSTRUCTION OF MINING TUNNEL—AGREEMENT TO PAY FOR LABOR AND MATERIAL—MONEY ADVANCED TO CONTRACTORS—INTEREST IN PROFITS.—A bond to secure the performance of a contract for the construction of a mining tunnel, containing an agreement to pay in full all persons performing labor or furnishing materials for the contractors, or any person acting for them or under their authority, in connection with the contract, does not bind the sureties to repay to third parties moneys advanced by them to the contractors, under an agreement for a share in the profits secured by an assignment of the contract.

ID.—ACTION UPON BOND—PLEADING—FINDING—INSUFFICIENCY OF EVIDENCE.—In an action upon such bond, a complaint averring that

labor and materials of the value of a specified sum were advanced by the plaintiffs to one of the contractors named in the bond, and a finding to the same effect, against the sureties upon the bond, are not supported by evidence showing that moneys to the amount specified in the complaint were advanced by the plaintiffs to such contractor; nor can evidence that a small portion of the amount advanced was due for materials furnished, sustain the finding.

ID.—ASSIGNMENT OF CONTRACT, WITH AGREEMENT TO DIVIDE PROFITS—PARTNERSHIP.—The assignment of the contract to construct the tunnel to the plaintiffs, who advanced money under an agreement to divide the profits arising from the contract, for the use of the money advanced, does not constitute a partnership between the plaintiffs and the contractor making the assignment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The bond set forth in the complaint was signed by the sureties alone, A. D. Turner and J. L. Vermeil, who undertook to become sureties and guarantors "for the full performance on the part of J. S. Antonelle and S. R. Frazier, copartners doing business as J. S. Antonelle & Co., the parties of the second part in the above contract," being a contract made by them as second parties, with C. V. Perry and C. S. Holmes, as parties of the first part, for the construction of a tunnel in the "Butte Basin gravel mine." S. R. Frazier transferred his rights under the contract to J. S. Antonelle, November 6, 1895, and the assignment of the contract by J. S. Antonelle to the plaintiffs and the accompanying agreement for division of the profits between Antonelle and the plaintiffs were made November 7, 1895. Further facts are stated in the opinion.

A. Everett Ball, for Appellants.

J. K. Ross, for Respondents.

COOPER, C.—This is an appeal from a judgment in favor of plaintiffs and from an order denying the defendants' motion for a new trial. The complaint states in substance that on the first day of November, 1895, the defendant Antonelle entered into a contract with one Perry and others, under the

terms of which Antonelle was to build a tunnel in the Butte Basin gravel mine, situated in Amador county, within the time and for the consideration named in a written contract made by said parties.

Antonelle gave to said Perry and others an undertaking, with defendants Turner and Vermeil as sureties, conditioned that said Antonelle would faithfully perform the said contract and construct the said tunnel as he had agreed to do. The said undertaking contained the following conditions:

"We further agree that all persons who perform labor or furnish materials to the parties of the second part in said contract, or any person acting for them or by their authority, upon or in connection with the said contract, shall be paid in full for such labor and material; and we do hereby jointly and severally guarantee to all such persons the payment in full of all their claims, and hold ourselves responsible to them in the sum of three thousand dollars, or as much as may be necessary of the said sum, to pay them in full for all labor and materials furnished for said parties of the second part under said contract, or for any person acting for them or by their authority.

"This bond is intended to inure to the benefit of the parties of the first part in the above contract, and also to the benefit of all persons who perform labor or furnish materials for the parties of the second part in said contract, or for any person acting for them or by their authority.

"Witness our hands and seals, this 1st day of November, 1895.

"A. D. TURNER."

"J. L. VERMEIL."

That after the said contract was made and said undertaking given, the said Antonelle in due time entered upon the construction of the said tunnel in accordance with the said contract. "That the plaintiffs herein, relying upon said bond, furnished to the said J. S. Antonelle, at his special instance and request, between the dates of 10th and 31st of December, 1895, and with the full knowledge and consent of the said bondsmen, A. D. Turner and J. L. Vermeil, labor and material to the value of \$4,968.75, which labor and material was used in the construction of said tunnel with the full knowledge, consent, and at the instance and request of said defendants."

That the defendants, although requested, refused to pay plaintiffs the said sum of \$4,968.75 or any part thereof. Judgment was prayed for said sum and costs. Defendant Antonelle made no appearance, and his default was duly entered. The case was tried in the court below without a jury, findings filed, and judgment entered thereupon in favor of the plaintiffs. The court found that the plaintiffs did "furnish to the said J. S. Antonelle labor and material to the value of \$4,968.75," which said labor and material were used by said Antonelle in the construction of the said tunnel. The finding above quoted is in accordance with the allegations of the complaint, and is the vital finding upon which the court evidently based its conclusions of law in favor of plaintiffs and against appellants Turner and Vermeil. The appellants specifically attack the finding as being without support in the evidence, and we are of opinion that there is no evidence in the record to support it. The only evidence in any way bearing upon the finding is that of the plaintiff Cadenasso. He testified: "We advanced this \$4,900 under these agreements. . . . The amount of money advanced by us, and for which this action is brought, is as follows, viz: Cash advanced to J. S. Antonelle & Co., \$4,968.75." While the same witness was upon the stand the court addressing him, said: "As I understand it, you furnished certain moneys to Mr. Antonelle, and as security for that you received an assignment of this contract, and in addition to getting your money back you were to get half of the profits? A. Half of the profits."

In the discussion of the evidence and issues and in answer to questions of the court, the attorney for plaintiffs, addressing the court, said: "Our position is just this, that Cadenasso advanced this money under the bond and took personal security—the assignment to secure him for the money advanced, and, to pay him for the use of the money, one-half of the profits of the transaction."

It is therefore apparent from the record, from the only evidence in the record and from the statement of counsel to the court, that the testimony as to the "money advanced" was what plaintiffs relied upon in support of the allegation of "labor and material furnished" by plaintiffs to Antonelle. The court in the finding evidently treated the evidence as to

money being advanced as the equivalent of "labor and material." In this we think the learned judge was in error. Money is not labor, and it is not "material furnished" in the sense of the undertaking and the complaint.

The appellants Turner and Vermeil were sureties for Antonelle, and it is elementary law that sureties are never bound beyond the strict letter of their contract. They have a right to stand on the precise terms of their contract, and there is no authority for extending their liability beyond the stipulation to which they have chosen to bind themselves. In this case they bound themselves "to all persons who perform labor or furnish materials to the parties of the second part." The plaintiffs did neither. Under the mechanic's lien law of this state in favor of laborers who perform labor upon, and materialmen who furnish material to be used in the construction of a building, it was held that one who advanced money as a loan with which to buy material was not entitled to the benefit of the statute. (*Godefroy v. Caldwell*, 2 Cal. 492; 56 Am. Dec. 360.) In the opinion it is said: "One who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the law."

In *Dart v. Mayhew*, 60 Ga. 104, it was held that creditors furnishing money to sawmills have no lien under the act of 1868 and 1873 and the code. The language of the act is: "All persons furnishing sawmills with timber, logs, provisions, or any other thing necessary to carry on the work of sawmills, shall have liens on said mills and their products." In the opinion it is said: "While, therefore, money is necessary in one sense to carry on the work of a sawmill by buying the things necessary for that work, still it is not primarily the thing necessary. It buys what is used to carry it on from others. The people who actually furnish the timber or provisions or other things necessary have the lien; the money lender does not. If it had been the intention of the legislature to give such a lien, money would have been included under its own name and not under the general words 'or any other thing necessary.'"

The statute of Texas (Paschal's Digest, art. 7112) provides: "Any person or firm, artisan or mechanic, who may

labor, furnish material to erect any house or improvement shall have a lien on the lot or lots, or land necessarily connected therewith, to secure payment for labor done, material, and fixtures furnished for construction or repairs."

In the construction of this statute the supreme court said: "The statute under consideration seems sufficiently broad to embrace any person who might furnish material, yet the evident intention of the legislature in the use of this term was to include some character of material which entered into the structure of the building and formed a component part of it, and not a loan of money with which to purchase the same." (*Gaylord v. Loughridge*, 50 Tex. 577. To the same effect see *Boisot on Mechanics' Liens*, sec. 114; *Phillips on Mechanics' Liens*, 3d ed., sec. 159; *Weathersby v. Sleeper*, 42 Miss. 732, 741; *Brown v. Rodocker*, 65 Iowa, 55.)

While the present case does not involve any question as to a claim of lien, the authorities quoted are in point as illustrating the meaning to be given to the clause of the undertaking. It follows the language of section 1203 of the Code of Civil Procedure in regard to the undertaking to be given by the contractor under the law of this state as to mechanics' liens. The language of the portion of the section in point is: "Said bond shall by its terms be made to inure to the benefit of any and all persons who perform labor for or furnish materials to the contractor."

The question here is as to whether evidence that plaintiffs furnished money will support the finding that they furnished material, and we think it will not, either upon reason or authority. It is claimed that plaintiff Cadenasso testified that \$1,600 was for material. He did in one part of his evidence say that he believed something like \$1,600 was for material. He did not state what the material was, nor where nor to whom it was delivered. If this, in view of the other evidence of Cadenasso, were sufficient to support any finding as to material furnished, it would not change the result here. The witness said that he received under the contract \$1,140, which was credited on account of materials. This would leave only \$430 due for materials. This would not support the finding that \$4,968.75 was due plaintiff for labor and materials furnished to defendant Antonelle.

The sixth finding, to the effect that the plaintiffs were not at any time partners of Antonelle, is supported by the evidence. The assignment by Antonelle of his contract and all sums due or to become due under it, with an agreement to divide the profits with plaintiffs for the use of the money advanced, did not make the plaintiffs partners of Antonelle. (*Hanna v. Flint*, 14 Cal. 74; *Nofsinger v. Goldman*, 122 Cal. 610; *Coward v. Clanton*, 122 Cal. 454; *Eastman v. Clark*, 53 N. H. 276; 16 Am. Rep. 192.)

Under the views herein expressed it becomes unnecessary to discuss other points.

As defendant Antonelle has not appealed the judgment is in full force against him.

We advise that the judgment and order as to appellants Turner and Vermeil be reversed.

Britt, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order as to appellants Turner and Vermeil are reversed.

McFarland, J., Henshaw, J., Temple, J.

[S. F. No. 1853. In Bank.—December 29, 1899.]

A. T. PATTON, Respondent, v. BOARD OF HEALTH OF CITY AND COUNTY OF SAN FRANCISCO et al., Appellants.

OFFICERS—EMPLOYEES—REMOVAL—CAUSE—PLEASURE OF APPOINTING POWER—CONSTITUTIONAL LAW.—Though the legislature has power to provide that mere appointees or employees of a public board, who are not officers, may not be removed without just cause, implying the right to notice and an opportunity to be heard before removal, it has no power to make such provision in relation to an officer whose tenure of office is during the pleasure of the authority making the appointment by the terms of section 16 of article XX of the state constitution.

ID.—NATURE OF OFFICE—FIXED COMPENSATION—PUBLIC DUTIES—CONTINUOUS EMPLOYMENT.—When the legislature creates a position, to which a fixed compensation or salary is attached, and the duties of which pertain to the public, and are to be exercised for the

public benefit, and the employment in which is continuous and not merely temporary, transient, or occasional, such position or employment is an office, and he who occupies it is an officer.

1D.—PRESCRIPTION OF OFFICIAL DUTIES BY PUBLIC BOARD.—The fact that the prescription of the duties of an office is not directly determined by the legislature, and that the legislature has delegated to a public board, directed to make the appointment, the power as superior officers, to determine the duties of the officer appointed by them, does not render the position any the less an office.

1D.—HEALTH INSPECTOR AN OFFICER—TENURE OF OFFICE—PLEASURE OF BOARD OF HEALTH.—A health inspector required to be appointed by the board of health of the city and county of San Francisco, and whose duties are to be fixed by the board, under section 3009 of the Political Code, and whose salary is provided for in section 3010 of that code, is an officer within the meaning of section 16 of article XX of the state constitution. His tenure of office, not being otherwise fixed, is subject to the pleasure of the board of health, and is not subject to the statutory requirement of section 3009 against removal otherwise than for cause.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion.

Garret W. McEnerney, and Sidney M. Ehrman, for Appellants.

A health inspector of the city and county of San Francisco is a public officer within the provisions of section 16 of article XX of the constitution. His salary is fixed by section 3010. The provision in section 3009, in regard to removal for cause only, being in violation of the constitutional provision as to the pleasure of the appointing power, is unconstitutional and void. (*People v. Hill*, 7 Cal. 97; *Smith v. Brown*, 59 Cal. 672; *People v. Shear* (Cal., Sept. 24, 1887), 15 Pac. Rep. 92.) A health inspector falls within the recognized definitions and authorities as to what constitutes a public office or officer. (Bacon's Abridgment, tit. Office and Officers, A; Burrill's Law Dictionary, tit. Office; *Henley v. Mayor*, 5 Bing. 91; *United States v. Hartwell*, 6 Wall. 385, 393; *United States v. Maurice*, 2 Brock. 96, 103; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Bradford v. Justices*,

38 Ga. 332; *Bunn v. People*, 45 Ill. 397; *Attorney General v. Drohan*, 169 Mass. 534; 61 Am. St. Rep. 301; *Brown v. Russell*, 166 Mass. 14; 55 Am. St. Rep. 357; *People ex rel. Armsted v. Nostrand*, 46 N. Y. 381; *People ex rel. Kelley v. Common Council*, 77 N. Y. 503; 33 Am. Rep. 659; *Opinion of Judges*, 3 Me. 481; *Rowland v. Mayor*, 83 N. Y. 376; *Moser v. Mayor*, 21 Hun. 163; *In re Hardy*, 17 Misc. Rep. 667; 41 N. Y. Supp. 469; *Ricketts v. New York*, 67 How. Pr. 320; *Vaughn v. English*, 8 Cal. 40.)

James P. Langhorne, W. F. Fitzgerald, and A. T. Patton, *in pro. per.*, for Respondent.

The only person designated as an officer in the clause of section 3009 providing for health inspectors is the "quarantine officer." In other clauses certain "officers" are mentioned, and also "other employees." The nature of the functions of an employee determine the official or unofficial character of his employment. (*State v. Kennon*, 7 Ohio St. 557.) The health inspector is a mere agent, servant, or messenger of the board of health, and is not an officer. (*Smith v. Mayor*, 67 Barb. 223; *Olmstead v. Mayor*, 42 N. Y. Sup. Ct. 482; *People v. Pinckney*, 32 N. Y. 377; *Bunn v. People*, 45 Ill. 397.) Treating the "position" of health inspector as analogous to an office, still he could only be removed for "cause" after hearing. (*State ex rel. Lewis v. Board of Public Works*, 51 N. J. L. 240; *Kennedy v. Board of Education*, 82 Cal. 483; *Marion v. Board of Education*, 97 Cal. 608; *State ex rel. Denison v. St. Louis*, 90 Mo. 22; *State ex rel. Daily v. Essex County Freeholders*, 58 N. J. L. 319; *State ex rel. Reid v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663; *Haight v. Love*, 39 N. J. L. 22; *Dullam v. Willson*, 53 Mich. 392; 51 Am. Rep. 128; *Hallgren v. Campbell*, 82 Mich. 260; 21 Am. St. Rep. 557; *State ex rel. Hastings v. Smith*, 35 Neb. 13; *Ham v. Boston Board Police*, 142 Mass. 95; *People v. Carver*, 5 Colo. App. 159; *People ex rel. Munday v. Fire Commrs.*, 72 N. Y. 448; Mechem on Public Offices and Officers, sec. 454.) Every presumption is to be indulged in favor of the constitutionality of the express provision against removal of health inspectors, except for cause, contained in the section providing for their appointment (*Bourland v. Hildreth*, 26 Cal. 161; *People v. Frisbie*, 26

Cal. 135; *University v. Bernard*, 57 Cal. 612; *People v. Hayne*, 83 Cal. 111; 17 Am. St. Rep. 217.)

CHIPMAN, C.—Plaintiff brings this action against the board of health of the city and county of San Francisco for a writ of mandate requiring it to admit plaintiff to the position of health inspector and to approve certain of his demands on the treasury for salary accruing since his removal.

The court found as facts that the board of health appointed plaintiff on August 6, 1895, as one of the six health inspectors provided to be appointed by section 3009 of the Political Code; that the board of health, in its order appointing plaintiff, did not specify or in any manner limit the term for which plaintiff should hold or exercise the position; that plaintiff entered upon the discharge of his duties pursuant to such appointment, and discharge the duties required of him by the board until about November 6, 1896, at which time, and while plaintiff was proceeding to perform his duties, the board passed a resolution purporting by its terms to remove plaintiff from his said position, "but the said resolution was so passed without plaintiff's knowledge or consent, and without any notice to him that any charge whatever had been made against him, or that any charge against him would be heard by said board, . . . and plaintiff had no opportunity to be heard in his own behalf before said board of health or its members before the passage of said resolution." It is further found that solely upon the authority of said resolution plaintiff has been denied his right to be and act as such health inspector, and has been deprived of the emoluments pertaining to said position; that the duties of plaintiff as such inspector, prescribed by the board, were "to inspect premises concerning which complaints have been made to said board, and to report thereon to said board, and to serve notices issued by said board to person to abate nuisances on their premises."

As conclusions of law, the court found that plaintiff has never been legally removed from the position of health inspector, and that he is still one of the six health inspectors appointed by the board of health August 6, 1895, and that "it is not material whether plaintiff was guilty of insolence, insubordination, or neglect, as he had no trial on such charge or charges"; that plaintiff is not an officer or commissioner

within the meaning of section 16, article XX, of the constitution of this state, and that plaintiff is entitled to the writ, etc. At the trial plaintiff testified: "When I became a health inspector no written commission was issued to me. I took no oath of office, nor filed any bond." Plaintiff had judgment, from which and from the order denying new trial defendant appeals. Appellant relies principally upon the following proposition: The plaintiff's term of office as health inspector not having been fixed by the constitution or by law, he held at the pleasure of the appointing power; and that portion of section 3009 of the Political Code, prohibiting his removal without just cause is unconstitutional and void, because in violation of section 16, article XX, of the constitution.

This provision of the constitution reads as follows: "When the term of any officer or commissioner is not provided for in this constitution, the term may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years." It is conceded that the term of the position of health inspector is not prescribed either in the constitution or by any law. Section 3009 of the Political Code contains the following, among other provisions: "The board of health must appoint . . . six health inspectors . . . whose duties must be fixed by the board of health. . . . The appointing power aforesaid is vested solely in said board of health, and said board shall have power to prescribe the duties of said appointees (referring to health inspectors and many other appointees), and shall not remove the same without just cause." It cannot be doubted that the legislature may authorize the employment of persons to perform certain duties in their nature public, to be prescribed by the authority making the appointment of such persons, and may provide in the law that such persons shall not be removed without just cause, if the employment is not an office within the meaning of the constitution; and it is well settled that under such a clause in the statute the appointee is entitled to notice and opportunity to be heard before he can be legally removed. (*Kennedy v. Board of Education*, 82 Cal. 483; *Marion v. Board of Education*, 97 Cal. 608; *Fairchild v. Board of Education*, 107 Cal. 92.)

With the policy of such a law we have nothing to do; its wisdom or unwisdom is for the legislature alone to determine. We are only concerned, in the present case, with the question, Is the health inspector an officer within the meaning of the provision of the constitution above quoted?

Many of the cases and authors giving definitions of the word "office" and "officer" as used in statutes and constitutions will be found cited in Chapter 1 of Mechem on Public Offices and Officers. Counsel in their briefs have called attention to some others. I do not think it possible from this mass of learning to deduce a definition universally applicable, although nearly every conceivable case has arisen and has been passed upon. It seems to be agreed by all writers that certain things are requisite to make a given employment a public office and its incumbent a public officer. Then there are numerous criteria which, while not in themselves conclusive, are yet held to indicate more or less strongly the legislative intent to create or not to create an office. One of the requisites is that the office itself must be created by the constitution of the state or it must be authorized by some statute. The section of the constitution in question embraces all classes of officers, statutory as well as constitutional. (*People v. Perry*, 79 Cal. 105.) But not all employments authorized by law are public offices in the sense of the constitution. The presidency of a private corporation may be spoken of as an office; an executor, guardian, a referee for the decision and trial of an action, are all officers who derive their existence from statutes, but they are not public officers in the constitutional sense; "their authority is restricted to specific matters, and no general powers are conferred upon them authorizing them to act in respect of all cases, or in any case or matter other than specified and named in their appointment. They owe no duty to the public, and could perform no service for the public. . . . 'Public office,' as used in the constitution, has respect to a permanent trust to be exercised in behalf of the government, or of all citizens who may need the intervention of a public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and

to hold the place and perform the duty for the term and by the tenure prescribed by law." (*In re Hathaway*, 71 N. Y. 238.) Danforth, J., in *Rowland v. Mayor*, 83 N. Y. 376, said: "Whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be in office." "Platt, J., in *Matter of Oaths*, 20 Johns. 492, speaks of "office" as "an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental." Pearson, C. J., in *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488, said: "A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer. . . . The essence of it is the duty of performing an agency—that is, of doing some act or acts, or series of acts, for the state." It has hence been held by most courts, as was said in the opinion of the judges, given to the governor, reported in appendix to 3 Me. 481: "The term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office, and the exercise of such power, within legal limits, constitutes the correct discharge of the duties of such office." The opinion proceeds to further point out the distinction between an office and an employment under the government. "The power thus delegated and possessed may be a portion belonging to some one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws, which are considered as the rules of action and the guardians of rights." In *United States v. Maurice*, 2 Brock. 96, Chief Justice Marshall, in determining that the "agent of fortifications" is an officer of the United States,

said: "An office is defined to be 'a public charge or employment,' and he who performs the duties of the office is an officer. . . . Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or perform a service without becoming an officer. But if the duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to the station without any contract defining them, if those duties continue, though the person be changed—it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer. If it may be converted into a contract, it must be a contract to perform the duties of the office of agent of fortifications, and such an office must exist with ascertained duties, or there is no standard by which the extent of the condition can be measured." Judge Cooley distinguished the "officer" from the "employee" in the "greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of the position." (*Throop v. Langdon*, 40 Mich. 673.) But it has been held that an oath of office is not a necessary criterion; nor is salary. These are but incidents and form no part of the office, though they may aid in determining the nature of the position. Duration or continuance have been said to be embraced in the term "office" and Chief Justice Marshall, in the case cited, spoke of the duty being a continuing one as an important element. But Chief Justice Pearson, in the North Carolina case cited, said "that it made no difference whether there be but one act or a series of acts to be done—whether the office expires as soon as the one act is done, or is to be held for years or during good behavior"—the service being performed for the state. Our court at an early day, in *Vaughn v. English*, 8 Cal. 40, held that the clerks in the offices of secretary of state and controller and treasurer of state were officers within the meaning of the act of April 21, 1856. (Stats. 1856, p. 224.) It was there said:

"The term 'officer,' in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by government." The definition given in 4 Jacob's Law Dictionary, 433, was quoted as follows: "It is said every man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits, because it is the duty of his office and the nature of that duty which makes him a public officer, and not the extent of his authority." The opinion continues: "The respondent was appointed by government; the duties which he is to perform concern the public, and he is paid out of the public treasury; he is, therefore, a public officer." It was held that because there was no definite term of the office could not be urged as an objection, for the clerks are appointed for the term of the officer making the appointment, subject to the power of removal.

It was held in *United States v. Germaine*, 99 U. S. 508, that civil surgeons appointed by the commissioner of pensions are not officers of the United States, because they are not appointed by a head of a department, nor are the appointments approved by such head, and this distinguished the case from *United States v. Hartwell*, 6 Wall. 385, where it was held that a clerk in the office of the assistant treasurer of the United States is an officer within the meaning of the act of Congress of June 14, 1866 (14 Stats. at Large, 65), punishing embezzlement. It was there said: "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary."

In the case of *Bunn v. People* (1867), 45 Ill. 397, the cases were very fully examined and the conclusion reached that the commissioners appointed under an act of the legislature to superintend the construction of the statehouse were not officers within the meaning of the constitution, but were agents or employees for a single and special purpose, whose functions ceased upon the completion of the work. The

question was subsequently regarded in that state of sufficient importance to call for a constitutional definition, and hence in 1870 the constitution ordained the following: "An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power or for a fixed term, with a successor elected or appointed. An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished." (Ill. Const. 1870, art. 5, sec. 24.)

Somewhat in line with the Illinois case last above cited is the case of *McDaniel v. Yuba County*, 14 Cal. 444, where it was held that the examining physician of the county hospital was not an officer but an employee, to be paid under the terms of his contract, though his services were rendered in a capacity in the nature of a public office or appointment. And so it was held recently in *White v. Alameda*, 124 Cal. 95, that the position of driver of a street wagon, with a salary fixed by the board of trustees, was not an office, but a mere employment held at the pleasure of the board.

In the case of *Quigg v. Evans*, 121 Cal. 546, the question was whether the harbor master of the port of Eureka was an officer within the meaning of section 8, article V, of the constitution, which reads: "When an office from any cause becomes vacant and no mode is provided by law for filling such vacancy," the governor may appoint, etc. The act creating the position reads: "The town marshal of Eureka is the harbor master of the port of Eureka." etc. By the act he was to enforce the rules and regulations of the harbor commissioners, and his compensation was to be fixed by them. It was held that the office of harbor master was created, and that when, by the adoption of a new charter, the city of Eureka no longer had a town marshal, there existed a vacancy in the office which the governor could fill.

Illustrations might be multiplied, but it would only emphasize what must already be apparent, that the definitions of the term "office," while not inaccurate, taken in a general sense, are quite inadequate when applied to particular cases. An examination of adjudicated cases will show that the disagreement among judges has not been so much as to definitions as in their application to the circumstances of each particular case.

Turning to the statute we find that it is made the duty of the board of health to appoint a large number of persons to various positions therein named, of greater or less importance (Pol. Code, sec. 3009) ; among which are six health inspectors. In every case "the duties must be fixed by the board of health," except in the single instance of the two police surgeons, who, in addition to the duties to be prescribed by the board, "shall make all autopsies required of them by the coroner." Certain "medical attendants" and "employees" are to be paid such compensation as the board shall fix, but most of the appointees named are to be paid salaries fixed by section 3010 of the Political Code, while others are to be paid such sums as may be authorized by law: "Health inspectors, twelve hundred dollars each." It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public and are continuing and permanent, not occasional or temporary, such position or employment is an office and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office.

It is only where the legislature has delegated its power to create the office and to prescribe the duties and compensation, that differences of opinion have arisen in the courts. Without attempting a reconciliation of these differences, it appears that the legislature in the present case has created the office and has fixed the salary attaching to it; the employment is a continuing one and not transient, occasional, or incidental, and its incumbent would remain in office should the officers of the board of health cease to act as such, and the office of health inspectors would continue if the incumbents were removed or for any cause ceased to act. The health inspector is invested with some portion of the sovereign functions of government, to be exercised for the benefit of the public; his duties are not prescribed by contract, but are defined by the government through the board of health, and we find in the em-

ployment all the elements mentioned in the Hartwell case, *supra*, viz., tenure, duration, emoluments, duties, and a compensation fixed by law. The element of duties to be performed involved in the creation of an office under all definitions and under most of the decisions was not directly determined by the legislature; to the board was delegated the power to prescribe the duties. But many cases hold, we think properly, that an employment may be none the less an office, although the duties are to be prescribed by a superior officer.

"The board of health have general supervision of all matters appertaining to the sanitary condition of the city and county," etc. (Pol. Code, sec. 3012); their powers and duties are large and important, and the statute authorizes the board to devolve upon the health inspectors such portion of these powers and duties as the board may deem best for the good of the public service. So far as the evidence shows, the duties thus delegated to the inspectors are not extensive, but they cannot be said to be unimportant or purely ministerial, or lacking in the requirements of judgment and discretion; and the board may at any time enlarge them. It is difficult to take this case out of the rules which governed the case of *Quigg v. Eureka*, *supra*, or the case of *United States v. Hartwell*, *supra*, or *United States v. Maurice*, *supra*, or the principles laid down in the opinion of the judges reported in 3 Maine, *supra*, or to distinguish it from *Vaughn v. English*, *supra*.

In the case of *Kennedy v. Board of Education*, *supra*, it was conceded by both parties and assumed by the court in the majority opinion that the position of teacher in the public schools of the city and county of San Francisco is not an office, and hence that case cannot aid us in reaching a decision here.

Our conclusion is that the intention of the legislature was to make the health inspectors officers within the meaning of the constitution, and, having failed to declare the term of the office, they hold during the pleasure of the board of health. (*People v. Perry*, *supra*; *People v. Hill*, 7 Cal. 97; *Smith v. Brown*, 59 Cal. 672.)

It is advised that the judgment be reversed, with directions to dismiss the writ.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, with directions to dismiss the writ.

Harrison, J., Garoutte, J., McFarland, J., Henshaw, J.
Rehearing denied.

[Sec. Nos. 610, 611. In Bank.—December 29, 1899.]

THE PEOPLE ex rel. COMMISSIONERS OF BUILDING AND LOAN ASSOCIATIONS, Respondent, v. UNION BUILDING AND LOAN ASSOCIATION OF SACRAMENTO et al, Appellants.

BUILDING AND LOAN ASSOCIATIONS—ACT RELATING TO STATE COMMISSIONERS—INJUNCTION SUIT—POWER TO APPOINT RECEIVER—PRINCIPLES OF EQUITY—DISCRETION.—The act of 1893 creating the commissioners of building and loan associations of the state of California, and authorizing the attorney general, upon complaint by the commissioners of the unsafe condition of a building and loan association, to sue for an injunction to restrain it from further conducting its business, and giving the court power in such suit to "appoint one or more receivers to take possession of its property and effects," does not authorize the court to appoint a receiver therein regardless of the general principles of equity, but only in the discretion of the court in a proper case for such appointment.

ID.—UNAUTHORIZED APPOINTMENT OF RECEIVER—RIGHTS OF DIRECTORS—STATE NOT INTERESTED—INSUFFICIENT SHOWING.—The rights of the directors of the building and loan association to wind up its affairs cannot be interfered with by the appointment of a receiver at the suit of the state, which is neither a creditor nor stockholder of the corporation, and has no pecuniary interest therein, where no facts are alleged and found as to fraud, mismanagement, or incompetency of the directors, such as would justify the appointment of a receiver if the application had been made by a creditor or stockholder of the corporation.

ID.—APPEAL—RECEIVER NOT A PARTY—SERVICE OF NOTICE—PETITION FOR REHEARING—ARGUMENT.—A receiver is appointed in a cause litigated between other parties, and can have no interest in the litigation, and cannot be an aggrieved party to the judgment. He has no right of appeal therefrom, and cannot have any standing in this court by the service upon him of a notice of appeal from the judgment, under which he was appointed as receiver. He cannot be authorized by such service to file a petition for rehearing, or to file a brief otherwise than as *amicus curiae*.

ID.—REVIEW UPON APPEAL FROM JUDGMENT—INTERVENTION NOT DISPOSED OF—ABSENCE OF BILL OF EXCEPTIONS—PRESUMPTION.—A complaint in intervention which was not finally disposed of, but remains pending upon demurrers thereto and a motion to strike out, cannot in the absence of a bill of exceptions, be considered upon appeal from the final judgment rendered in the cause; but it must be presumed that the intervenor did not apply for a postponement of the trial until issues could be formed upon his complaint, but that action thereupon was waived, so far as the trial of the other issues between the original parties was concerned.

ID.—REVIEW OF ORDER APPOINTING RECEIVER—PLEADINGS AND FINDINGS—ABSENCE OF EVIDENCE—PRESUMPTION.—Upon appeal from the judgment, where facts warranting the appointment of a receiver are neither averred in the pleadings nor shown in the findings, it cannot be presumed, in the absence of the evidence, that the court received evidence outside of the issues which may have justified the order; but the order making the appointment is properly reversed upon the judgment-roll.

APPEAL from a judgment of the Superior Court of Sacramento County. Matt F. Johnson, Judge.

The facts are stated in the opinion of the court in Bank and in the opinion rendered in Department Two.

Robert T. and William H. Devlin, for Union Building and Loan Association, Appellant.

L. Hatfield, for L. Tozer, Appellant.

W. F. Fitzgerald, Attorney General, and Tirey L. Ford, Attorney General, for Respondent.

Grove L. Johnson, James B. Devine, and A. M. Johnson, for Thomas W. O'Neil, Receiver.

THE COURT.—This case was heard in Department Two, and decided October 20, 1899, by which the judgment of the court below was modified by eliminating therefrom the order appointing a receiver, and as thus modified the judgment was affirmed. Afterward, a petition for a rehearing in Bank was filed by Thomas W. O'Neil, the receiver appointed by the court below, who, by stipulation of counsel and permission of the court, had filed a brief in said cause.

In the petition for rehearing it was suggested that said brief must have been overlooked by the commissioner who wrote the opinion, or that it failed to reach him.

Upon investigation, it was found that said brief on behalf of the receiver, and a reply thereto by appellant L. Tozer, had not reached either the commissioner or the Department, and upon that ground alone a rehearing in Bank was granted. O'Neil, having no other relation to the case than that of receiver, an officer of the court created by its judgment from which these appeals were taken, has no standing or relation to the case which would authorize him to petition the court for a rehearing, or even to file a brief therein except as an *amicus curiae*. (*In re Pina*, 112 Cal. 14.) He had no right of appeal. He was not a party aggrieved by the judgment from which the appeal was taken, and could not have taken an appeal, nor did the service upon him of the notice of appeal give him any standing in this court. He was not a party to the litigation, and had no interest in behalf of or against either party thereto. The only interest he has is that of retaining an office to which he was appointed by the court by its final judgment in a cause litigated by other parties.

The present attorney general has, however, indorsed upon said petition the following: "I hereby consent to the foregoing petition for rehearing and in this connection desire to add that, from an examination of the transcript on appeal (pages 26 and 27), it appears through some inadvertence a stipulation was entered into by this office on the ——— day of September, 1898, to the effect that the transcript on appeal contained 'the judgment-roll,' whereas in fact the complaint in intervention filed in said cause by Grove L. Johnson, intervenor, is omitted from the judgment-roll as printed in the transcript."

It is due to the learned attorney general to remark in this connection that said cause was tried under the administration of his predecessor in that office, and said consent was based upon a reference in the transcript to "Grove L. Johnson, Intervenor." Upon this representation, leave was given to respondent to file in this court a copy of the said complaint in intervention, and leave was also given to appellants to file a copy of the proceedings of the court below thereon; and from

said complaint and proceedings, now before this court upon said application to correct the record, it appears that this cause was tried on February 17, 1898, and that said complaint in intervention was not filed until that day that service thereof was acknowledged by the attorneys for the defendant association, and defendants Steinman, Heilbron, Jones, and Lock, "reserving all objections made as to granting permission to file the same"; that on February 26th demurrers to said complaint in intervention were filed by the defendants, and on the same day notice was given that on March 4th a motion to strike out parts of said complaint would be made. On March 4th said motion was continued one week, and on March 11, 1898, said motion was "continued without day, to be restored to the calendar upon ten days' notice." It thus appears that the complaint in intervention was not filed by consent of the defendants; that it was filed on the day of the trial, and was not heard or considered by the court, and is still pending therein upon said demurrers and motion to strike out. It therefore formed no part of the judgment-roll of the cause that was tried, and cannot be considered upon this appeal. We must assume, in the absence of a bill of exceptions showing otherwise, that no application was made by the intervenor to the court below to postpone the hearing of the case until an issue could be formed upon his complaint in intervention, and that all action thereon was waived, so far, at least, as that trial was concerned.

The rehearing having been granted because of the accident by which the briefs above mentioned were not considered by the court or the commissioners, it now becomes our duty to examine them.

In the brief on behalf of the receiver it is contended that the action of the court in appointing a receiver cannot be reviewed because the evidence heard by the court below has not been brought up by a bill or exceptions; that the only ground upon which the action of the court can be assailed is a want of jurisdiction to make the order complained of; that in the absence of a bill of exceptions it cannot be determined whether or not the court below erred in making the order appointing a receiver, since it cannot be known what facts were before the court, and must, therefore, presume that the evidence justified the appointment.

There is no merit in this contention. To sustain it we must presume that the court received evidence outside of the issues, which, if properly received, would justify the order appointing the receiver. It is not contended in this brief that the court failed to find upon any fact alleged in the complaint, but we are asked to affirm the order appointing a receiver, because we do not know but that the court may have received evidence of facts not in issue which justified it. For ought we know, facts may exist which would authorize the appointment of a receiver, but, unless the facts as alleged and found justify it, the order making the appointment is properly reversed on appeal from the judgment upon the judgment-roll.

Again, it is contended that the building and loan commissioners' act is a special statute, and is independent of the general provisions of law regulating the appointment of receivers, and that in cases under this statute "the court is authorized to make such appointment, regardless of general principles." This contention, as well as the further contention that "the findings are sufficient to show the existence of good cause for the appointment of a receiver, even when tested by the rules of equity and by the general provisions of the law," are sufficiently answered in the opinion heretofore filed, and which is hereby approved.

It is therefore ordered that the judgment entered in Department stand as the judgment of the court.

The following is the opinion rendered in Department Two, October 20, 1899:

HAYNES, C.—These are separate appeals taken upon the same record from the same judgment upon the judgment-roll. The appellants, however, are represented by different counsel, who have also presented separate briefs. The first is taken by the corporation and the second by a director. They present the same question for decision, and may, therefore, be disposed of together.

As the title of the case indicates, the defendant corporation is a building and loan association. In December, 1897, the commissioners of the building and loan associations of the state of California made an examination of the business and

affairs of said corporation, and reported to the attorney general that it was "conducting its business in an unsafe manner, such as to render its further proceeding hazardous to the public and to those having funds in its custody," and thereupon this action was brought by the attorney general under and in pursuance of the provisions of section 9 of the act creating said board of commissioners. (Stats. 1833, p. 231.) The defendants answered, and upon the hearing findings were made and judgment entered enjoining said corporation and its directors, servants, etc., "from the further prosecution of the business of the defendant corporation until the further order of the court," and appointing a receiver to take possession of its property and effects of every description, and, subject to the order of the court, liquidate and settle up the business of the corporation.

The only allegations of the complaint tending to justify the the complaint, and the findings, authorized the court to appoint a receiver to take charge of the corporate affairs and settle and liquidate the business of the corporation.

The only allegations of the complaint tending to justify the relief granted are the following: "That since the organization of said corporation the said corporation has loaned out large sums of money upon real estate security, and, in default of payment of said loan, has been compelled to take said property in payment of the moneys so loaned and interest thereon; that the cost of said real estate so obtained and now owned by said corporation exceeds the sum of one hundred and twelve thousand two hundred and fifteen dollars and fifty-two cents; that there are now outstanding loans on real estate to the amount of ninety thousand one hundred and eighteen dollars and twenty-four cents; that since making said loans upon said real estate and acquiring the title to the real estate as aforesaid the value of the said real estate has greatly depreciated and is now depreciating, which has reduced and will continue to reduce the assets of said corporation to such an extent as to render the further proceeding and conduct of the business hazardous to the public and to those having funds in its custody. That plaintiff is informed and believes, and upon such information and belief alleges, that unless the said defendants are enjoined and prohibited by this court from the transaction of any further business, the

said defendants will continue to prosecute and transact such business to the irreparable injury of the people of the state of California." The prayer is for an injunction, and, "if the court shall deem it expedient," that a receiver be appointed.

The only finding touching the existing condition of the corporation is the following:

"That actions have been commenced against the defendant corporation on promissory notes aggregating three thousand five hundred dollars; and property of the said corporation is now, and for more than twenty-nine days has been, under attachments levied thereon in said actions, and there are no funds available with which to discharge said attachments and indebtedness.

"That the necessary disbursements exceed the income of the defendant corporation; and, if the said corporation continue its business, its necessary disbursements will continue to exceed its income.

"That the said corporation has been compelled to take in satisfaction of loans a large amount of real estate, which since taking has greatly depreciated in value, and there is no assurance or probability of any increase in its value.

"That there is a large amount of indebtedness of said corporation now due, and there are not sufficient assets on hand that can be realized upon whereby said corporation will be able to pay said indebtedness in any reasonable time; that to continue the business of said corporation under such circumstances would require that a considerable portion of the monthly dues of the members and stockholders be used for the purpose of discharging the deficit in current expenses and interest after applying the income of the corporation to the same.

"That said corporation can no longer continue business without a continued impairment of the assets of said corporation, and dues to be paid in by members. That the assets of said corporation, if converted into money at this time, are insufficient to pay the existing indebtedness of said corporation and reimburse the stockholders of said corporation for moneys paid by them as dues. That the further proceeding with its business by said corporation would be unsafe and hazardous to the public and to those having funds in its custody and to its stockholders."

The court, it is true, further found: "That it is necessary and a proper case for the appointment of a receiver to settle and liquidate the business of the said defendant corporation"; but this is essentially a conclusion of law, which must find its justification in the allegations of the complaint and the findings of fact, if it be sustained.

Section 9 of said act authorizes the attorney general, upon receiving the report hereinbefore stated from said commissioners, to apply to the judge of the court to issue an injunction restraining the corporation from further proceeding with its business until a hearing can be had, and further provides: "Such judge may on such application issue such injunction, and, after a full hearing, may dissolve or modify it, or make it perpetual, and may make such orders and decrees, according to the course of proceedings in equity, to restrain or prohibit the further prosecution of the business of the corporation, as may be needful in the premises; and may appoint one or more receivers to take possession of its property and effects, subject to such directions as may from time to time be prescribed by the court."

It will be observed that this statute does not imperatively require the appointment of a receiver, but permits it in the discretion of the court, or, in other words, in proper cases.

In *Havemeyer v. Superior Court*, 84 Cal. 327, 365, 18 Am. St. Rep. 192, Mr. Chief Justice Beatty, speaking for the court, said: "Under our codes, the rule is not to appoint a receiver, but to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the date of the dissolution. The appointment of a receiver is the exception, not the rule, and is not to be made unless some party interested, either a creditor or a stockholder, can show that for the protection of his rights the appointment of a receiver and the administration of the assets under the control and superintendence of a court of equity is necessary."

Conceding that under the provisions of the building and loan commissioners' act, above quoted, a receiver may be appointed, it does not follow that the appointment was authorized under the facts of this case. The state is neither a creditor nor stockholder, and has no pecuniary interest in the

association. It is neither alleged nor found that there was any fraud or mismanagement on the part of the directors or officers of the corporation, or any want of competency on their part to liquidate and settle up its business and affairs economically and in the interest of its creditors and stockholders, so that if this application had been made by a creditor or stockholder the facts alleged and found would not have justified the appointment of a receiver; and, unless such facts are alleged and found as would justify the appointment at the instance of a creditor or stockholder, it cannot be made at the instance of the state under said statute.

The notice of appeal is to the effect that it is aken from the whole of the judgment, but appellants say that no point is made against the judgment enjoining the association from the further prosecution of its business.

I therefore advise that the judgment be modified by eliminating therefrom the order appointing a receiver and all the provisions thereof relating to such receivership, and as so modified that the judgment be affirmed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is hereby modified by eliminating therefrom the order appointing a receiver and all the provisions thereof relating to such receivership, and as so modified the judgment is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 564. Department Two.—December 30, 1899.]

THE PEOPLE, Respondent, v. A. F. SOAP, Appellant.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—REVIEW OF EVIDENCE.—A

verdict of guilty of manslaughter cannot be reversed upon appeal, upon the ground that the evidence shows that the homicide was committed in self-defense, where the evidence as to self-defense appears to be conflicting, and the appellate court cannot say, upon a review of the evidence, taking the testimony of the defendant together with the general facts proved, that the jury were not warranted in finding that the homicide was not committed in self-defense.

Id.—EVIDENCE—RECOLLECTION OF WITNESS—USE OF WORD “PRESUME.”—

A witness, in stating facts within his knowledge or personal observation, is not required to testify with that certainty which excludes all doubt, and the use of the word “presume” by the witness is not ground for striking out his evidence, when, as used by him, it evidently meant nothing more than a statement of his best recollection as to particulars of a fact observed.

Id.—MISCONDUCT OF JURY—AFFIDAVIT OF JUROR—MISREPRESENTATION AS TO PUNISHMENT FOR MANSLAUGHTER.—

An affidavit of a juror cannot be received to impeach the verdict by setting forth a misrepresentation made by a juror as to the limit of punishment which could be inflicted for manslaughter, by which many jurors were induced to agree upon a verdict of guilty of that offense.

Id.—NEWLY DISCOVERED EVIDENCE—DILIGENCE.—

A new trial cannot be granted for newly discovered evidence which is of slight importance, and in respect to which no diligence was shown in seeking to discover it before the trial.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

Bledsoe & Bledsoe, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

McFARLAND, J.—The defendant was accused by information of the crime of murder alleged to have been committed by feloniously, etc., killing one John Larkin. He was convicted of manslaughter and appeals from the judgment and from an order denying the motion for a new trial.

Appellant contends that the verdict is against the evidence, because the evidence shows that the homicide was committed in justifiable self-defense. This contention cannot be maintained. The circumstances of the killing, as detailed by the appellant himself when on the witness stand, tended, no doubt, to a considerable degree to show that the appellant killed the deceased in necessary self-defense; and it is contended that as the appellant was the only eye-witness of the killing other than the deceased, and as it was uncontradicted by any other witness, and was not inconsistent

with the other facts proven, therefore it is to be taken as true. But one Spikes, a witness for the prosecution, testified that he saw the killing, and that the occurrences connected with it were different in some important respects from those testified to by appellant. Appellant contends that the testimony of Spikes was "so manifestly corrupt and false as to forbid its consideration for any purpose, except in aid of defendant's vindication." This position, however, is not tenable. Although none of the other witnesses who came upon the scene immediately after the fatal shot was heard saw the witness Spikes there, still there was nothing in the evidence to preclude the jury from believing that he was there. It certainly could not be said, as a matter of law, that the jury should not have considered the testimony of Spikes. Of course, it does not appear how much, if any, weight the jury gave to his testimony. The jury was not bound to receive the testimony of the appellant as absolutely true, nor, if they believed the testimony of the appellant, can it be truly said that, taking his testimony together with the general facts proven, the jury were not warranted in finding that the homicide was not committed in necessary self-defense.

Appellant contends that the court erred in not striking out a certain expression used by the witness Spikes. The point arose in this way: The witness had been asked to describe the manner of deceased toward the defendant, and the witness testified as follows: "He was kind of waving one hand out that way, talking, and he had one hand down this way. He was kind of waving, that way. He was drunk and staggering and he had this one down. I presume it was on his pants. I couldn't tell. Mr. Bledsoe: We don't want your presumptions. State what you saw. We move to strike out what the witness says about presuming. The Court: What do you mean by saying you presume? That you are merely guessing at it, or that it was your best information? Witness: That was my best information." There was no error in this; while a witness can testify only to facts which are within his knowledge, he is not required to testify with that certainty which excludes all doubt from his mind. The word "presume" as used by the witness was nothing more than a statement of his best recollection.

Appellant contends that the judgment should be reversed on account of the alleged misconduct of the jury by which they were prevented from giving the case a fair and due consideration. This misconduct is based upon the fact, which appellant sought to show by an affidavit of one of the jurors, that while the jury were in consultation over the case a statement was made by one of them that a verdict of manslaughter could only be followed by the punishment of imprisonment in the county jail for six months, and that such statement induced a large number of the jurors who had been voting for an acquittal to agree to a verdict of manslaughter. This contention cannot be maintained; for it has been definitely settled that the affidavit of a juror cannot be received to impeach the verdict except where it is the result of a resort to the determination of chance. (See *People v. Azoff*, 105 Cal. 632, and cases there cited.)

The contention that a new trial should be granted on account of newly discovered evidence is without merit; there was no diligence shown in discovering the testimony before the trial, and the alleged newly discovered evidence was of little importance, even if it should be held admissible. No other errors are relied on for a reversal.

Appellant's counsel argues very strongly that the jury should have rendered a verdict of acquittal, and that, considering the great age and physical condition of appellant and the conduct of the deceased, it should have been found that he committed the homicide in necessary self-defense. This argument has considerable support in the general facts of the case. In cases of this kind juries, no doubt, sometimes attach too much importance to the mere fact of the homicide, and convictions sometimes follow where the plea of self-defense should have been sustained. But the decisions in such cases rest with juries; and where in such a case the trial judge who has heard all the evidence declines to grant a new trial it cannot be granted here, where as in the case at bar the testimony is fairly and substantially conflicting.

The judgment and order appealed from are affirmed.

Henshaw, J., and Beatty, J., concurred.

[Crim. No. 578. In Bank.—December 30, 1899.]

THE PEOPLE, Respondent, v. DORA FUHRIG, Appellant.

CRIMINAL LAW—ABORTION—EVIDENCE—DYING DECLARATIONS—BELIEF OF IMPENDING DEATH NOT SHOWN.—Dying declarations in reference to the commission of the crime of abortion, leading to the death of the declarant, are not admissible against a defendant charged with the abortion, where the circumstances surrounding the declarations, the condition of the declarant, and the testimony of the attending physician render it doubtful whether the declarant believed that the hand of death was laid upon her, and her conduct in failing to make any preparations for death seemed to indicate the contrary. Dying declarations are not admissible if the declarant had the slightest hope of recovery, and if it is not plainly manifest that they were made under a belief of impending death.

ID.—INTRODUCTION WRITTEN BY STENOGRAPHER WITHOUT REQUEST—RATIFICATION NOT DISTINCTLY SHOWN.—An introductory statement declaring a knowledge of impending death, written by the stenographer who took the evidence, without a previous statement of such knowledge by the declarant, or a request that it be written, is not shown to be distinctly ratified by a mere general assent to a long document embodying the statement after a single reading of it as a whole by the stenographer, and the signing of it by the declarant, especially where the circumstances are such as to indicate that a belief of impending death was not then manifestly in the mind of the declarant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

Robert Ferral, for Appellant.

To sustain the admissibility of dying declarations there must appear to be a settled, hopeless belief and expectation of impending death. (*Rex v. Peel*, 2 Fost. & F. 21; 6 Am. & Eng. Ency. of Law, 105, 114, 115; *People v. Hodgdon*, 55 Cal. 72; 36 Am. Rep. 30; *People v. Taylor*, 59 Cal. 640; *Regina v. Spilsbury*, 7 Car. & P. 187; *Errington's Case*, 2 Lew. 148.)

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

The belief of impending death appears from the signed statement, but might be shown in any manner. (1 Greenleaf on Evidence, sec. 158; *People v. Sanchez*, 24 Cal. 17; *People v. Bemmerly*, 87 Cal. 118.) It was the province of the trial judge to determine the admissibility of the declarations. (1 Bishop's New Criminal Procedure, sec. 1212; *People v. Smith*, 104 N. Y. 498; 58 Am. Rep. 547; *Kehoe v. Commonwealth*, 85 Pa. St. 127; *People v. Glenn*, 10 Cal. 32; Greenleaf on Evidence, sec. 160.)

GAROUTTE, J.—Defendant, having been convicted of the crime of abortion, appeals from the judgment and order denying her motion for a new trial.

The most important testimony in the case bearing upon defendant's guilt consists of a so-called dying declaration of the deceased. The conclusion the court has arrived at as to the admissibility of this declaration demands a new trial of the defendant. This declaration was in writing and signed by the deceased. It began as follows:

"Knowing I am about to die, I hereby make this my last statement and declare the same to be the truth and the whole truth, so help me God." This statement was made in the following manner, as disclosed by the testimony of O. H. Heynemann. He testifies as follows:

"My name is Otto H. Heynemann; am stenographer to the chief of police of this city; held that position all of December last; still hold that position; have seen Dr. Perry; accompanied Detective Cody to the house of Mrs. Walmsley, at 418 Laguna street, in this city; got there between 10 and 11 o'clock in the morning; saw Mrs. Walmsley, the deceased, there; recognize that document; outside of the signatures the handwriting in it is mine; the statement therein, except the formal part—the first line—was made by the deceased, Mrs. Walmsley; Detective Cody, Dr. Perry, a lady, and myself were present; Mrs. Walmsley was in bed, sick; prior to making her statement Dr. Perry told her that she would probably die, and to make a statement and tell the truth; noticed her appearance." He further testified that at this time "she looked to be very emaciated. She seemed to be in a very weak state. She made this statement immediately after the doctor told her she would probably die." The witness continued: "I wrote down the state-

ment she made immediately after the doctor told her she would probably die; the language she used commences on page 2; she used none of the language on page 1; the balance of the statement contains her language; her language begins with 'My name is'; I read the whole of the statement to her, including the first page—the entire statement to its close, and before she signed it she said that it was all right; and she signed it; she said it was all right; afterward Dr. Perry, Mr. Cody, and myself signed it; from the second page to the close of the statement contain the exact words she used; she appeared to be mentally all right." The language which the witness says the deceased did not use, but which he inserted in the statement, is the language which we have heretofore quoted from the statement. The cause of the woman's death was peritonitis, and she died the day succeeding the time of the making of the statement. The foregoing evidence in substance contains everything tending to show the condition of the woman's mind at the time she made the statement.

We find the following definition of dying declarations in the American and English Encyclopedia of Law, volume 6, page 105: "Dying declarations are statements of material facts concerning the cause and circumstances of homicide, made by the victim under the solemn belief of impending death, the effect of which on the mind is regarded as equivalent to the sanctity of an oath." In the case of *People v. Hodgdon*, 55 Cal. 72, this court said: "Dying declarations are not admissible in evidence if the declarant had the slightest hope of recovery, although he dies within an hour afterward." Indeed, there is no controversy here as to the law. The difficulty arises when a given state of facts is tested in the measure furnished by the law. Yet, in this case, there is no serious difficulty furnished in making the test. We have found no case in the text-books or decisions of courts where hearsay statements have been admitted before the jury under the guise of dying declarations upon evidence so meager as that disclosed in this record. Let us pause a moment to look at the facts, at the same time bearing in mind that the all-important question is, 'Did this woman at the time she made this statement firmly believe that her death was then impending? In other words, did

she believe at the time that she was about to die? We lay aside as unimportant the facts that she was emaciated and in a weak state. Hardly to the slightest degree do these circumstances tend to prove the issue. They might be quite material in some cases, but we do not appreciate their importance here. Neither do we attach any weight to the statement of the doctor to her that she "would probably die." The usual and ordinary effect of such a statement by a doctor to a patient would be to infuse in his mind a hope, a possibility at least, of recovery. Such a statement would naturally indicate that the doctor himself still had some hopes of the patient's recovery. Laying this statement aside, we then have nothing left save the declaration found in the written statement as follows: "Knowing I am about to die I hereby make this last statement, and declare." This excerpt from the writing must form the foundation upon which to rest the admissibility of the dying declaration or a foundation is lacking. Yet the difficulty at once presents itself that this statement was a declaration made by the stenographer, and not by the woman. The condition of the mind when a purported dying declaration is made may be determined by the acts or the language of the party. These acts and this language may unite in tending to show one condition of mind, or they may each point to a different condition of mind, and when they are inconsistent with the conduct of the patient may indutiably overthrow any conclusion based upon his language, and the reverse may be equally true. So it is not in every case of a statement by the patient that he believes himself about to die that a sufficient foundation for the admission of his declarations is created. But, as suggested, we have not even that here. A statement consisting of one hundred and eighty-four words is read to this dying woman without break or interruption. At the conclusion of the reading she stated it was all right and signed it. It therefore results from the foregoing that the entire basis for the admission of these declarations rests upon a ratification by the unfortunate woman of the stenographer's statement to the effect that she knew that she was about to die. And this ratification of the statement is found in a general assent to the correctness of the entire contents of quite a long written document. To sustain the people in their contention upon this point

would be going beyond sound legal principles. If the particular statement of the stenographer had been separately and directly called to the attention of the woman, and she had understandingly and unconditionally declared such statement to be the truth, the question here presented would be different. Certainly, a much stronger showing would then be made. But we have no such case, and the showing made is entirely too weak.

We are more fully impressed with the soundness of this conclusion when we find the physician who had paid her several professional visits, and who was present when the purported dying statement was made, in answer to the question put by the district attorney, "Could you tell, Doctor, from her statement [referring to the statement here under consideration] and manner, whether or not Mrs. Walmsley appeared to appreciate the fact that she was in a dying condition?" saying: "Not positively, I could not." If the attending physician, who knew all about the woman's condition, who had told her that she would probably die, who was in possession of all the evidence that was before the reporter when he made the statement, and which was before the court upon this trial, and who was present when the statement was made, was unable to make a positive declaration that the woman thought she was about to die, then surely her belief of impending death was not plainly manifest. In addition to all this she made no preparation whatever for death, gave no direction as to her effects, offered no suggestion as to a final parting with her friends and relatives, said nothing and did nothing to indicate that the hand of death was laid upon her. Yet all this time she was fully conscious, her mind was clear, she could talk and use her hands.

The trial court justified its ruling in admitting this statement as a dying declaration upon the authority of *People v. Bemmerly*, 87 Cal. 117, but upon a careful consideration of that case, the court finds nothing there furnishing authority for the ruling here made. In that case it is said: "*Aliunde* the written declaration there is sufficient evidence that it was made under a sense of impending death." Again it is said: "Whether the statement alone would be sufficient to satisfy the rule that the declaration must be made under a sense of impending death need not be decided in this case, as there

was other evidence that it was so made." We also find a broad chasm dividing the two cases in their facts in this: In the Bemmerly case the party writing the dying declaration of the wounded man placed nothing therein except what had been in substance stated to him. In the case at bar, the writer of the declaration bodily placed declarations of matter therein which had never even been suggested by the unfortunate woman. Again, in the Bemmerly case the statement after being written was read to the wounded man a single sentence at a time, and then indorsed by him as true, sentence by sentence. Thus every separate sentence was brought directly home to his mind. In the case at bar the statement was read to the woman in bulk, and only indorsed by her in the same way. From what has been said the great difference in the facts of the two cases is readily perceptible.

For the foregoing reasons the judgment and order are reversed and the cause remanded for a new trial.

Temple, J., McFarland, J., Harrison, J., Van Dyke, J., Henshaw, J., and Beatty, C. J., concurred.

[S. F. No. 1262. In Bank.—December 30, 1899.]

SOUTHERN CALIFORNIA RAILWAY COMPANY, Petitioner, v. SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent.

WRIT OF REVIEW—APPEALABLE ORDERS.—A writ of review cannot be allowed for the purpose of annulling orders from which an appeal may be taken.

ID.—ORDERS AFTER JUDGMENT—ACTION INVOLVING REAL ESTATE—ORDERS STRIKING OUT STAY BOND AND DIRECTING PAYMENT OF SMALL JUDGMENT.—In an action involving the title of possession of real estate, transferred from the justice's court to the superior court, this court has appellate jurisdiction; and orders made after judgment therein in the superior court, striking out an undertaking to stay execution pending an appeal to this court, and directing the sheriff to pay moneys collected under the execution to the plaintiff in satisfaction of the judgment in a sum less than three hundred dollars, are appealable, and cannot be annulled upon writ of review.

ID.—AMOUNT INVOLVED IN APPEALABLE ORDERS IMMATERIAL.—All special orders made after final judgment in the superior court are made appealable, without reference to any amount in value that may be involved in the order. The order striking out the stay bond being unquestionably appealable, the order directing the payment of the money to the plaintiff is a mere incident thereto, and is proper if the former order is sustained; but both orders are appealable by the express language of the code.

ID.—DISMISSAL OF WRIT OF REVIEW.—A writ of review to annul appealable orders must be dismissed.

PETITION in Supreme Court for writ of review to annul orders of the Superior Court of San Diego County. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

C. N. Sterry, and Henry J. Stevens, for Petitioner.

VAN DYKE, J.—In an action by Amelia B. Baker and husband against the Southern California Railway Company, petitioner herein, tried in the superior court of San Diego county, plaintiffs recovered judgment, from which judgment and an order denying a new trial the petitioner, as defendant therein, appealed on October 9, 1897, and on October 21st said defendant filed an undertaking on appeal, which, by reason of certain defects, was insufficient to stay execution of the judgment. Prior to the filing of said undertaking execution was issued on the judgment and notice of garnishment served upon the First National Bank of San Diego. On October 22, 1897, upon notice served, the judge of the superior court ordered the garnishee to pay to the sheriff an amount of money sufficient to satisfy the judgment, being about one hundred and fifty dollars; but before any payment was made under said order the defendant therein, petitioner here, filed another bond, sufficient in form to stay the execution of the judgment. Thereafter, upon motion of plaintiff's attorney in said action, the court made an order striking said last undertaking from the files of the court, and directing the sheriff to turn over the money received by him under such garnishment to the plaintiffs. The defendant in said action seeks under writ of review issued herein to have these orders annulled.

Respondent urges the dismissal of this proceeding on the ground that *certiorari* or review is not the proper remedy, inasmuch as the writ of review cannot issue where there is an appeal, and that the orders complained of, being special orders after final judgment, an appeal lies therefrom. (Code Civ. Proc., secs. 939-1068.) This contention is practically conceded on the part of the petitioner, provided the case of *Harron v. Harron*, 123 Cal. 508, decided since this proceeding has been pending, is to apply in this case; but it is claimed by petitioner that at the time of filing the petition here, and up to the decision of *Harron v. Harron*, *supra*, it has been uniformly held by this court that an appeal would not lie in a case like this, and that therefore the old rule should govern.

The following cases are referred to in support of petitioner's contention: *Oullahan v. Morrissey*, 73 Cal. 297; *Langan v. Langan*, 83 Cal. 618; 86 Cal. 132; *Sellick v. De Carlow*, 95 Cal. 644; *Fairbanks v. Lampkin*, 99 Cal. 429; *Perry v. Quackenbush*, 105 Cal. 299; *Foley v. California Horseshoe Co.*, 115 Cal. 184; 56 Am. St. Rep. 87.

Oullahan v. Morrissey, *supra*, was an appeal from a judgment of the superior court, and the court says: "The plaintiff having consented to the entry of the judgment against himself cannot appeal from it, or, if he can, can be heard only as to that portion as to which he did not consent. That, in this case, is at the most the demand for costs, which, being less than three hundred dollars, does not give this court jurisdiction." *Langan v. Langan* *supra*, was an appeal from an order, *pendente lite*, directing the defendant to pay plaintiff twenty-five dollars per month alimony, and another order to pay one hundred and fifty dollars counsel fees, which appeals were dismissed, as stated by the court, "because the amount in dispute is too small to give the court jurisdiction." The second appeal in the same case, in 86 California, was also for temporary alimony and counsel fees entered before judgment. *Sellick v. De Carlow*, *supra*, was an appeal from an order denying motion to strike out plaintiff's cost bill, and the court, Department Two, in its opinion says: "We deem it proper to say, however, for future guidance, that the question whether or not this court has jurisdiction of an appeal from a separate, independent order made after final

judgment, involving money only, and in an amount less than three hundred dollars, must be considered at least an open question." *Fairbanks v. Lampkin, supra*, was also an order taxing a cost bill, the amount of which was one hundred and seventy-one dollars and twenty cents, and the court, Department Two, say: "An order made after final judgment is a separate, independent proceeding, and when it involves money only, and the amount involved is less than three hundred dollars, this court has no jurisdiction, under the constitution, of an appeal from such order." The court, after referring to former decisions, say: "And, assuming the question to be an open one, we are satisfied that we have no jurisdiction of this appeal." This is the first instance where it is clearly held that in an order made after final judgment, even in a separate, independent proceeding involving money only in an amount less than three hundred dollars, an appeal will not lie. *Perry v. Quackenbush, supra*, was an appeal from the judgment and from an order refusing to strike out the cost bill. After considering the appeal from the judgment, Commissioner Temple, who wrote the opinion, in reference to the appeal from the order, says (on the authority of *Fairbanks v. Lampkin, supra*): "The mount of the costs claimed was less than three hundred dollars; this court, therefore, has no jurisdiction to hear the appeal." *Foley v. California Horseshoe Company, supra*, was an appeal from a judgment and order denying a new trial, and from an order denying a motion to set aside the judgment taxing costs, and the separate appeal from the order taxing costs was dismissed on the authority of *Fairbanks v. Lampkin, supra*.

As said in *Harron v. Harron, supra*, *Fairbanks v. Lampkin, supra*, was decided mainly upon the authority of *Langan v. Langan, supra*, and was based upon the proposition that the amount of money involved in the appeal was determinative of the jurisdiction of this court; but the appellate jurisdiction of this court includes all appealable orders that may be taken in a "case" which is within its jurisdiction, and it follows therefrom that the amount of money involved in an appealable order is not the test for determining its jurisdiction. And the court adds: "The correctness of the decision in *Fairbanks v. Lampkin, supra*, was, moreover, never brought before the court in Bank, and as it establishes

no rule of conduct or of property we have less hesitation in holding that to the extent that it is inconsistent with the views here presented it is not to be regarded as authority." The constitution confers upon this court appellate jurisdiction, among other matters, "in all cases at law which involve the title or possession of real estate," and this without regard to the money value involved. The action of *Baker v. Southern California Ry. Co.*, falls under this branch of jurisdiction, as was determined in the appeals taken from the judgment therein, in 110 Cal. 455, 114 Cal. 501, and 126 Cal. 516. Under the former practice, as well as under the code, all special orders made after final judgment are made appealable without reference to any amount in value that may be involved in the order. And also under the former practice, as well as under the code, the writ of *certiorari* or review would not lie where there was an appeal. *Gilman v. Contra Costa County*, 8 Cal. 52, 68 Am. Dec. 290, was an appeal from an order overruling a motion to quash an execution and discharge a levy. The court say: "The first question presented is whether an appeal will lie in such a case. The three hundred and thirty-sixth section of the practice act gives an appeal from 'any special order made after judgment'"; and, after defining what an order is within the meaning of the law, the court held that the one in question was appealable. In *McCullough v. Clark*, 41 Cal. 298, the court held an order directing the application of certain property in proceedings supplemental to execution appealable. In *San Jose v. Fulton*, 45 Cal. 317, an order refusing to vacate an order granting a writ of assistance was held appealable. In *Livermore v. Campbell*, 52 Cal. 75, an order setting aside the judgment on the ground that it was invalid was held appealable. *Grant v. Superior Court*, 106, Cal. 324, was prohibition to prevent fixing the compensation and paying a receiver on an order previously made, and it was held that the writ should not issue "for the reason that the petitioners have a plain, speedy, and adequate remedy by appeal. *Stoddard v. Superior Court*, 108 Cal. 303, was an application to this court for a writ of *certiorari* or review, and to annul an order of the superior court granting an injunction after judgment, and in the opinion it is said: "It may be readily admitted that the court had no jurisdiction to make

the order; but as the order is appealable *certiorari* will not lie, because it lies only where 'there is no appeal.' " (Citing *Stuttmeister v. Superior Court*, 71 Cal. 322, where it is said: "The writ [*certiorari*] will not lie when there is an appeal from the action complained of; the writ is not given in lieu of an appeal, but only to review errors in excess of jurisdiction, for which an appeal does not lie.") Proceeding further, the court say: "We have been referred to no case in which it has been held that under our code the writ of *certiorari* will lie to reverse an appealable order. That the appeal does not offer a plain, speedy and adequate remedy makes no difference; the provision of the statute governs." *White v. Superior Court*, 110 Cal. 54, was also an application to review and prohibit execution of an order of the superior court requiring a receiver to sell the property of the petitioner, and the court say: "It is very clear that the facts do not make a case wherein *certiorari* may be availed of. That writ will lie only where there is no appeal from the judgment or order complained of. (Citing a number of cases.)

"The order in question is a special order made after final judgment, and as such it is made the subject of appeal by express terms of the statute."

From the foregoing it will be seen that the petitioner's assumption that the decisions of this court prior to *Harron v. Harron*, *supra*, held that orders like the ones in question were not appealable, and that *certiorari* is the proper remedy, is not sustained.

The main grievance in this case consists in striking from the files the undertaking on appeal, for the stay bond being out of the way it was not improper on the part of the court to direct the application of the money in the hands of the sheriff to the satisfaction of the judgment; in other words, that order was a mere incident of the former proceeding. But both the orders are special orders made after final judgment, and such are made appealable by express language of the code, and as to the former, which involves no question of money value, no decision of this court can be found in which it is held that it is not appealable.

For the foregoing reasons the writ must be dismissed, and it is so ordered.

Harrison, J., Garoutte, J., and Temple, J., concurred.

[Crim. No. 553. Department One.—January 3, 1900.]

**THE PEOPLE, Respondent, v. GEORGE M. McINTYRE,
Appellant.**

CRIMINAL LAW—EVIDENCE—DEPOSITION TAKEN ON PRELIMINARY EXAMINATION—AUTHENTICATION.—The authentication of the deposition of a witness given on the preliminary examination of a defendant accused of a felony, by a certificate of the stenographer who took the testimony, stating that it is "a true and correct transcript from the shorthand notes taken by me, and a full and complete record of the proceedings had and testimony given in the above-entitled case," though careless in not following the language of the statute, is in substantial compliance therewith, and includes in the meaning of the certificate "a correct statement of such testimony and proceedings in the case," as required by section 869 of the Penal Code.

ID.—COMPARISON OF TRANSCRIPT WITH SHORTHAND NOTES—VARIANCE PRESUMED HARMLESS—ABSENCE OF EVIDENCE.—A discrepancy between the shorthand notes and the transcript, principally in the matter of punctuation, causing a dispute whether the prosecuting witness had said that he went to bed or got up "at 7 o'clock," is presumed harmless, in the absence of any evidence in the record upon appeal showing the materiality of the variance. If the variance was in fact material, the defendant should have embodied enough of the evidence in the record to show its materiality.

ID.—APPOINTMENT OF SHORTHAND REPORTER BY MAGISTRATE—QUALIFICATIONS—CONSTRUCTION OF CODE.—Section 869 of the Penal Code, authorizing the magistrate at a preliminary examination to appoint a shorthand reporter, only requires that he be competent to do the work; and that section is not to be construed as requiring the same qualifications prescribed for official reporters of the superior courts in chapter III, title IV, of the Code of Civil Procedure.

ID.—WAIVER OF OBJECTION TO COMPETENCY OF APPOINTEE—PRESUMPTION—IMMATERIAL QUESTION AT TRIAL.—When the defendant had an attorney present at the preliminary examination, who then made no objection to the competency of the shorthand reporter appointed by the magistrate, objection thereto is waived; and it must be presumed at the trial that the appointee was satisfactory to the court and to the defendant. A question asked of the reporter at the trial, whether a committee had been appointed to examine him, is properly disallowed as immaterial.

ID.—ABSENCE OF WITNESS FROM STATE—SUFFICIENCY OF SHOWING.—The testimony of the officer requested to serve a subpoena for a prose-

cuting witness, to the effect that, after following every clew of inquiry, he was informed by various persons acquainted with the witness that he had left the state, and that it could not be told when he would return, though it was said by one person that he was liable to return upon business at any time, but that, after further efforts to locate the witness, the officer could not find him, is a sufficient showing to justify the admission in evidence of the deposition of the witness taken at the preliminary examination.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

George W. Smith, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

THE COURT.—Defendant was convicted of the crime of grand larceny. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

When the case was called for trial, the complaining witness failing to appear, the district attorney was permitted to read in evidence, against defendant's objection, the deposition of said witness given on the preliminary examination of defendant in the police court. The only question involved in this appeal is as to the correctness of this ruling.

1. It is objected that the transcript was not certified as required by law. Section 869 of the Penal Code provides: "The deposition or testimony of the witness must be authenticated in the following form: . . . When taken down in shorthand, the transcript of the reporter appointed as aforesaid, when written out in longhand writing and certified as being a correct statement of such testimony and proceedings in the case; shall be *prima facie* a correct statement of such testimony and proceedings." The certificate in question reads: "I hereby certify the foregoing to be a true and correct transcript from the shorthand notes taken by me, and a full and complete record of the proceedings had and testimony given in the above-entitled case."

While the stenographer was grossly careless in not consulting the statute when formulating his certificate to the transcript of the evidence, still, after careful consideration, the court has arrived at the conclusion that the certificate is made in substantial compliance with the form demanded by the statute. It is certified that the transcript contains a full and complete record of the testimony given in the cause. A complete record of the testimony of the witness may fairly be said to be a correct statement of his testimony.

2. When the deposition of the witness was being read, the defendant demanded a comparison of it with the shorthand notes. It was disclosed that the deposition was not a correct transcript of the reporter's notes in several particulars, and it was objected to for that reason. The only difference between the deposition and the notes of apparent significance related to what occurred at the hotel where the prosecuting witness had testified that he and defendant went to lodge on the night the larceny is alleged to have taken place. The two went together to this hotel, as it appears by the deposition. The witness was asked by the district attorney to give the exact text of his notes: "The Witness: A. Yes, and we got a two-bed room there, and I went to my bed, and at 7 o'clock I got up in the morning and I missed my money." Counsel for defendant read from the transcript, addressing the witness: "Q. I will read it again, and I read the punctuation: "Yes, (comma), and we got a two-bed room (period). And I went to my bed at 7 o'clock (period). And I got up in the morning and I missed my money.' Is that correct? A. That is not correct." The witness was asked if there was anything in his notes that he (the prosecuting witness) got up at 7 o'clock; to which he replied, "No, sir." The dispute seemed to be whether the witness had said he went to bed at 7 o'clock, or had said that he got up at 7 o'clock. Defendant contends that the fact was important because there was evidence that the defendant left the room, where he and the witness were sleeping, at 5 o'clock in the morning. The evidence is not before us, and we cannot say whether the variance between the shorthand reporter's notes and the transcript of them was material to defendant's case. Whether the fact was that the prosecuting witness went to bed at 7 o'clock or got up at 7

o'clock may have been entirely immaterial, and, if material, the defendant should have embodied enough of the evidence in the record to show its materiality. Injury will not be presumed from error which on its face is harmless.

3. Appellant contends that the deposition was not taken by a reporter appointed according to law. Section 869 of the Penal Code provides that the magistrate before whom the examination is had "may, . . . order the testimony and proceedings to be taken down in shorthand, . . . and for that purpose he may appoint a shorthand reporter." It is claimed that the magistrate may not, under this section, appoint except the appointee possesses the qualifications prescribed for official reporters of superior courts by chapter III, title IV, of the Code of Civil Procedure. Stress is laid upon section 270 of that code, which provides that: "No person shall be appointed to the position of official reporter of any court in this state, except," etc. Then follow the prescribed qualifications. This chapter relates exclusively to the official reporter of superior courts. (Code Civ. Proc., secs. 269 et seq.) Appellant would read these sections into section 869 of the Penal Code. We can find nothing in the provisions of the two codes to warrant us in doing so. No doubt the legislature contemplated that the official reporter referred to in the Code of Civil Procedure should possess certain qualifications, and so should a shorthand reporter called in by a magistrate be competent to do the work, for its importance is even greater than in civil cases; but the legislature nowhere in section 869 has intimated that the shorthand reporter there mentioned should be an official reporter of some superior court, or that he should possess the qualifications of some reporter. Furthermore, it appears that the defendant had an attorney present at the preliminary examination who then made no objection to the reporter appointed by the magistrate. It must be presumed that he was satisfactory to the court and to the accused, and possessed the necessary qualifications; and when, therefore, at the trial, counsel asked the reporter (the witness) whether there had been a committee appointed to examine him, the court properly refused the question as immaterial. The time to test his qualifications and to object that he did not possess them was at the preliminary examination.

4. It is claimed that the showing was insufficient that the witness could not be found in the state. The officer who served the subpoena testified that he went to the hotel where Berti, the prosecuting witness, stopped. "I went there and inquired of the proprietor, who told me that Berti was not stopping there, that he had left and gone to Montana. Acting on information received, I went to a saloon near by, on Montgomery avenue, kept by Mr. Conti, and inquired for Berti and got the same reply; that he had gone to Montana." He was then directed to inquire of a fellow-countryman who kept a razor sharpening place, who told the witness that he knew Berti. "I asked him if he knew when Berti would be back into town again; he said he could not say, that Berti had some business in Sonoma county and was liable to come at any time." He also testified to further efforts made by him which resulted in a failure to locate the witness. The evidence discloses the showing to be sufficient.

For the foregoing reasons the judgment and order are affirmed.

[Sac. No. 603. Department One.—January 3, 1900.]

In the Matter of the Estate of BENJAMIN E. ATWOOD,
Deceased. ITUREA ATWOOD HICKS, Appellant, v.
H. B. SANDERS, Respondent.

ESTATES OF DECEASED PERSONS—PROPERTY LESS THAN FIFTEEN HUNDRED DOLLARS—RIGHTS OF WIDOW—REVOCATION OF LETTERS—NOTICE TO CREDITORS—MAXIM.—A widow, who is administratrix of her deceased husband, cannot have her letters revoked for failing to give notice to creditors for more than two months after her appointment, under section 1511 of the Code of Civil Procedure, where both her petition for letters and the return of the inventory and appraisement show that the entire property of the estate is of less value than fifteen hundred dollars. In such case the widow, if there are no children, is entitled to have the whole estate set apart to her under section 1469 of the same code, without any further proceedings in the administration; and no notice to creditors is necessary.

ID.—PETITION TO REVOKE LETTERS BY PERSONS NOT INTERESTED.—The law does not permit persons not interested to invoke the machinery of the courts; and a sister and niece of the decedent, who can have no interest in an estate which the widow is entitled to have

set apart to her, cannot authorize a person not interested in any manner in the estate to file a petition to revoke letters of administration granted to the widow.

APPEAL from an order of the Superior Court of Glenn County removing an administratrix and appointing an administrator in her stead. Frank Moody, Judge.

The facts are stated in the opinion.

Charles L. Donohoe, for Appellant.

Seth Millington, for Respondent.

COOPER, C.—Appeal from an order removing appellant as administratrix and appointing respondent as administrator in her stead. Deceased died December 7, 1894, leaving surviving him his wife, Iturea Atwood, but no children.

On the eighth day of February, 1897, the superior court, upon proper petition, duly made an order appointing the said Iturea Atwood administratrix of the estate of deceased, and she therefore qualified and letters of administration were issued to her. Thereafter the administratrix procured the appointment of appraisers, and on the twenty-third day of June, 1897, an inventory and appraisalment was duly returned and filed, which showed the entire estate to be community property and of the value of three hundred and ninety dollars. On the 18th of October, 1897, one H. B. Sanders, the respondent herein, at the written request of a sister and also of a niece of deceased, filed a petition asking to have the letters of administration issued to said Iturea Atwood revoked solely upon the ground that she had failed and neglected for more than two months to have notice to creditors published as required by statute, and further asking that petitioner Sanders be appointed administrator of said estate. This petition did not show or attempt to show that the petitioner, or anyone whom he represented, was a creditor of deceased; neither did it show that the said property was not community property. It stated the value of the estate to be less than fifteen hundred dollars, to wit, six hundred and fifty dollars. On the fourteenth day of February, 1898, before any citation had been ordered, issued, or served on the said petitioner, the said administratrix applied to the court for an

order directing proper publication of notice to creditors, and the court then and there refused to make the order. Thereafter, the respondent asked for and procured a citation, upon his petition, directing the appellant to show cause on the eighteenth day of April why her letters should not be revoked and respondent appointed administrator. On the day fixed in the citation the appellant filed her answer to the petition. The court proceeded to hear the evidence, documentary and otherwise, but the record does not show the date the said matter was heard. It does appear, however, that at the time of the hearing the notice to creditors had been published, because the record shows that the affidavit of the publishers of the "Orland News" was introduced in evidence, which showed that the notice to creditors was published in said paper in its "weekly issues of March 31, April 7, 14, and 21, 1898." On June 6, 1898, the court, after the publication of notice to creditors had been so made by appellant, made an order revoking the letters of appellant and directing that letters of administration issue to respondent. This order was made without any proof that respondent had posted notices or given any notice whatever of his application, except that given by the service of citation upon respondent. As we think the court erred in revoking the letters of appellant, and as no letters could issue to respondent until the letters of appellant had been revoked, it is not necessary here to discuss the question as to whether letters could be issued to respondent without giving the usual notice of his application as prescribed by statute. The court below evidently, without considering any other section of the code, regarded section 1511 of the Code of Civil Procedure as mandatory. The section reads: "If an executor or administrator neglects, for two months after his appointment, to give notice to creditors, as prescribed by this chapter, the court must revoke his letters and appoint some other person in his stead, equally or the next in order entitled to the appointment."

We think the section should be read and construed with section 1469 of the Code of Civil Procedure, which provides that if, upon the return of the inventory of the estate of a deceased person, it shall appear therefrom that the value of the whole of the estate does not exceed the sum of fifteen hundred dollars, the court shall, after giving notice

and upon hearing, if it finds the value of the estate does not exceed fifteen hundred dollars, "assign to the widow of deceased, if there be a widow, . . . the whole of the estate . . . and there must be no further proceedings in the administration unless further estate be discovered." In this case it not only appears from the inventory but from the petition upon which the court acted that the estate does not exceed fifteen hundred dollars. The widow is, therefore, entitled to the whole of the estate, and petitioners have no interest whatever in it. After the estate is set apart "there shall be no further proceedings in the administration." Evidently, notice to creditors is a proceeding in the administration, and therefore the statute is express that such notice must not be given after the estate is so set apart to the widow. It is true in this case that the estate had not been so set apart, but as the widow was and is entitled to have it set apart, and this regardless of the time that had elapsed, we cannot see any possible good that would be accomplished by publishing notice to creditors. The law does not require vain things. Neither does it allow parties to come into court and put the machinery of the law in motion in matters in which they have no possible interest.

In *Estate of Palomares*, 63 Cal. 402, it appeared from the inventory that the whole of the estate did not exceed fifteen hundred dollars. After notice, as directed by the statute, and on the twenty-eighth day of February, 1882, the court set apart the whole of the property for the support of the minor children. On July 12, 1882, one Briswalter, a creditor, filed a petition asking that the order of February 28th be set aside upon the ground, among others, that no notice to creditors had been given at the time said order was made. The lower court denied the prayer of the petition and this court affirmed the order. In the opinion it is said: "For the decision of this appeal it is necessary only to say that no notice to general creditors was required to be given."

It clearly appears in this case that the widow is entitled to all the estate. There is no necessity for further administration. The appointment of another administrator and the publication of notice to creditors could have no possible ef-

fect except to diminish and help to eat up the very small pittance left to the widow by the deceased. It could not possibly benefit creditors. Then why should notice be given to them? The cost of publication, the commissions of the administrator and the fee of his attorney would have to be paid out of the widow's mite. It might benefit the administrator, his attorney, and the publisher of a newspaper, but the object of the law is to protect the widow and minor children and not to pay out of the estate useless expenses to persons in no way interested in the estate except to the extent they may be able to get money out of it.

The order should be reversed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order is reversed. Garoutte, J., Van Dyke, J., Harrison, J.

[S. F. No. 1548. Department Two.—January 4, 1900.]

BOSWELL M. BLYTHE, Appellant, v. FLORENCE
BLYTHE HINCKLEY, Respondent.

ALIENS—CONTROL AND INHERITANCE OF PROPERTY—TREATY.—The question as to the rights of aliens to possess, enjoy, and inherit property in the United States is a proper subject matter of treaty; and a treaty regulating those rights must control all state legislation contrary thereto as the supreme law.

ID.—POWER OF STATE—LAWS NOT IN CONFLICT WITH TREATY.—A state has the primary right to regulate the tenure of all real property within its limits, and may allow aliens to take, hold, and dispose of property, real and personal, within the state, in so far as its laws are not in conflict with the express provisions of a paramount treaty of the United States.

ID.—INHERITABLE BLOOD—CHANGE OF COMMON LAW.—A state may, by express law, change the common-law rule that an alien was not of inheritable blood, and may thereby remove the disability of the alien to inherit, if there is no paramount law to the contrary.

ID.—CONSTRUCTION OF TREATY WITH GREAT BRITAIN—SILENCE AS TO INHERITANCE—VALIDITY OF CODE PROVISION.—The silence of the treaty between the United States and Great Britain upon the subject matter of the right of citizens of Great Britain to inherit

property within the United States, is not equivalent to a denial of that right, and cannot affect the power of a state to confer the right. That treaty is not in conflict with section 671 of our Civil Code, allowing aliens, including citizens of Great Britain, to "take, hold, and dispose of property, real and personal, within this state."

ID.—NONRESIDENT ALIENS—OPERATION OF CODE.—The provisions of section 671 of the Civil Code are not made to operate extraterritorially, by conferring a right upon nonresident aliens to take and hold property within this state. That section merely provides a rule with respect to property within the state, and confers a right to be enjoyed within its jurisdiction.

ID.—CONSTRUCTION OF STATE CONSTITUTION.—Section 17 of article I of the state constitution is merely intended to secure the rights of foreigners of the classes named, and does not operate as a limitation upon the power of the legislature to extend similar privileges to other foreigners or aliens.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

S. W. & E. B. Holladay, L. D. McKisick, and Jefferson Chandler, for Appellant.

The treaty making power is denied to the states (U. S. Const., art 1, sec. 10), and the treaty making power of the United States extends to the manner in which property in the United States may be transferred, devised, or inherited. (*Geofroy v. Riggs*, 133 U. S. 266; *Head Money Cases*, 112 U. S. 598; *Wunderle v. Wunderle*, 144 Ill. 53, 54; *People v. Gerke*, 5 Cal. 382.) The laws of California cannot operate extraterritorially to give the right of inheritance to a nonresident alien. (*In re Ross*, 140 U. S. 453-64; *The Apollon*, 9 Wheat. 370.) A treaty of the United States overrides all state laws upon the subject of inheritance by aliens. (*Adams v. Akerlund*, 168 Ill. 632; *Opel v. Shoup*, 100 Iowa, 407; *Hauenstein v. Lynham*, 100 U. S. 483; *Geofroy v. Riggs*, *supra*; *Ware v. Hylton*, 3 Dall. 199; *Chirac v. Chirac*, 2 Wheat. 259; *Orr v. Hodgdon*, 4 Wheat. 453; *Fairfax v. Hunter*, 7 Cranch. 603; *People v. Gerke*, *supra*; *Fisher v. Harnden*, 1 Paine, 55; *Wunderle v. Wunderle*, *supra*.) The treaty making power of the federal government to regulate this matter is exclusive; and the silence of a treaty, like

the silence of a law, is expressive of its intention. (*United States v. Cruikshank*, 92 U. S. 550; *Prigg v. Pennsylvania*, 16 Pet. 618; *Holmes v. Jennison*, 14 Pet. 569; *People v. Curtis*, 50 N. Y. 326; 10 Am. Rep. 483.) Section 671 of the Civil Code is inconsistent with the treaty making power, and with all treaties made by the United States upon that subject matter. That section being unconstitutional and void, any judgment based thereon is void. (*Ex parte Siebold*, 100 U. S. 376; *Ex parte Yarbrough*, 110 U. S. 651; *Reddy v. Tinkum*, 60 Cal. 459.) The admission of non-resident aliens to our shores, and their permission to remain here, is a political question to be determined by the federal government, and not by any state. (*Chy Lung v. Freeman*, 92 U. S. 280; *Fong Yue Tong v. United States*, 149 U. S. 698.) Foreign British subjects residing in England are given no power by treaty or by the federal government to inherit property in this country, and this state cannot confer such power upon a non-resident British subject. The proceedings in the state court in the matter of the heirship of Florence Blythe, a nonresident British subject at the time of descent cast, are void, and are subject to collateral attack. (*Van Fleet's Collateral Attack*, sec. 514; *Windsor v. McVeigh*, 93 U. S. 282, 283; *Hovey v. Elliott*, 167 U. S. 409; *Scott v. McNeal*, 154 U. S. 34.)

William H. H. Hart, Garber, Boalt & Bishop, W. W. Foote, and Aylett R. Cotton, for Respondent.

The complaint discloses a subject matter which is *res adjudicata*, and a decree *in rem*, which binds the whole world. (*William Hill Co. v. Lawler*, 116 Cal. 359; *Burris v. Kennedy*, 108 Cal. 331, 336; *State v. McGlynn*, 20 Cal. 234; 81 Am. Dec. 118.) Section 671 of the Civil Code is a valid exercise of the power of this state to regulate the tenure of property situated within its jurisdiction. (*United States v. Fox*, 94 U. S. 315-20; *Arndt v. Griggs*, 134 U. S. 316-21; *Hutchinson Inv. Co. v. Caldwell*, 152 U. S. 65-68; *Mager v. Grima*, 8 How. 490, 493; *Frederickson v. Louisiana*, 23 How. 445; *Beard v. Rowan*, 9 Pet. 301; *Hanrick v. Patrick*, 119 U. S. 156, 167-70; *Spratt v. Spratt*, 1 Pet. 343; *Hauenstein v. Lynham*, 100 U. S. 483, 484; *Geofrey v. Riggs*, 133 U. S. 258, 267.) Sections 671 and 672 of the Civil Code do not assume to operate extraterritorially,

but operate merely upon the tenure of property situated within the state, and are constitutional and void. (*State v. Smith*, 70 Cal. 153-55; *Lyons v. State*, 67 Cal. 380; *State v. Rogers*, 13 Cal. 160.) No federal question was involved in the Blythe case. (*Blythe v. Hinckley*, 167 U. S. 746.)

HENSHAW, J.—The purpose of this action was to recover from defendant certain land in the city and county of San Francisco. Plaintiff claims as an heir at law of Thomas H. Blythe, deceased. Without setting forth in detail the matters charged, it will be sufficient to say that the complaint pleads the proceedings and the judgments of the superior and supreme courts of this state, under which it was decreed that Thomas H. Blythe had instituted Florence Blythe, now Florence Blythe Hinckley, as heir, and the subsequent decree of the court distributing the property in question to her. The facts and the judgment to which reference has thus been made will be found at length in the action entitled *Blythe v. Ayres*, 96 Cal. 532. It is contended by this bill that the judgments of the superior court and of this court so decreeing are absolutely void, and that plaintiff, as one of the heirs at law of Thomas H. Blythe, deceased, should have judgment to that effect. A general demurrer was sustained to this bill, and plaintiff, declining to amend, appeals from the judgment thereupon entered against him.

In support of the complaint it is urged that Florence Blythe, at the time of descent cast, was an alien and British subject, who had never been within the jurisdiction of the United States or of the state of California, and that the state of California had, and has, no power to extend to such non-resident aliens the right to inherit real estate within its territorial domain in the absence of a treaty provision to that effect between the United States and the country of such alien; that sections 230 and 1387 of the Civil Code, as applied to the case of such a nonresident alien, are without effect; that section 671 of the Civil Code is in violation of section 10 of article I of the constitution of the United States, which declares that: "No state shall enter into any treaty, alliance, or confederation," and is in violation of section 17 of article I of the constitution of the state of California, which (it is argued) limits the right of succession

to the classes designated in the following language: "Foreigners of the white race or of African descent eligible to become citizens of the United States under the naturalization laws thereof, while *bona fide* residents of this state, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native-born citizens."

It has been affirmed and reaffirmed in the decisions of the supreme court of the United States that the question of the possession, enjoyment, and inheritance of property by resident or nonresident aliens is the proper subject matter of treaty. Thus, to employ but one quotation, in *Geofroy v. Riggs*, 133 U. S. 258, it is said: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries." This principle was early recognized in this state in the case of *People v. Gerke*, 5 Cal. 381.

It need scarcely be said that at common law an alien was not of inheritable blood, and that disability attaches in this state, unless it has been removed by express law. By section 671 of our Civil Code it is declared that: "Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state." Here is an express removal of the disability to which we have referred, and, if it be a valid law, it is determinative of appellant's contention. It is conceded that the treaties between Great Britain and this country are silent upon the subject. We are not then confronted with the case of a state law in declared conflict with the provision of a treaty, in which instance it is, of course, uniformly held that the treaty is the paramount law. (*Opel v. Shoup*, 100 Iowa, 407; *Hauenstein v. Lynham*, 100 U. S. 483; *Geofroy v. Riggs*, *supra*; *Orr v. Hodgdon*, 4 Wheat. 453.) But by appellant it is insisted that the very silence of our treaties with Great Britain upon the question is the equivalent of an express denial to its subjects of the right to inherit within our republic, and

that therefore a conflict arises and section 671 becomes void as an illegal attempt to encroach upon the treaty making power of the general government. But this view, we think, finds little favor either in principle or in authority. A state has the undoubted right to regulate the tenure and disposition of the real property within its boundaries, and such regulations always have been and should be held valid except where they conflict with the express provisions of a higher law. Thus in *United States v. Fox*, 94 U. S. 315, it is said: "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established rule of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." (See, also, *Hutchinson Inv. Co. v. Caldwell*, 152 U. S. 65; *Mager v. Grima*, 8 How. 490; *Beard v. Rowan*, 9 Pet. 301.) And this right to regulate the tenure and disposition of real property within its boundaries is not only in the state, but it is primarily in the state (*Hauenstein v. Lynham*, *supra*), and is subject only to such control as may be exercised by the general government within its treaty making power. Therefore, it will be found that the supreme court of the United States nowhere declares state laws upon the subject to be void as an invasion of the treaty making power, but uniformly upholds the laws when not in conflict with the express provisions of a treaty. Such was the case in *Hanrick v. Patrick*, 119 U. S. 156, where the question was of the right of an alien subject of Great Britain to inherit, and the court held that the laws of Texas governing the rights of aliens to inherit property in that state were of controlling force. And even in those cases where there is a conflict between the provisions of the state law and those of the treaty, it is not held that the state laws are void as an unwarranted interference with or encroachment upon the powers of the federal government. It is held merely that such laws, in so far as they conflict with the treaty provisions, are suspended or controlled during the life of the treaty. Thus in *Geofroy v. Riggs*, *supra*, the

question being as to the effect of the provisions of a treaty with France upon the laws of Maryland, which were in operation in the District of Columbia, it is said: "The treaty, being part of the supreme law of the land, controls the statute and common law of Maryland whenever it differs from them. . . . The treaty expired by its own limitation in eight years pursuant to an article inserted by the senate. During its continuance citizens of France could take property in the District of Columbia by inheritance from citizens of the United States, but after its expiration that right was limited as provided by the statute and common law of Maryland."

It is concluded, therefore, upon this proposition that the sections of our Civil Code which have been under consideration are not in conflict with the provisions of any treaty between the United States and Great Britain, and are not an invasion of the treaty making powers of the United States government.

The argument that section 671 is inoperative to cast descent upon defendant, for the reason that the laws of the state can have no extraterritorial force, seems to be fully answered by the language of this court in *State v. Smith*, 70 Cal. 153, where it is said, discussing this very section: "It is suggested that, inasmuch as laws can have no extraterritorial operation, the legislature has no power to provide for succession by foreigners who had never been residents, but the section of the code provides a rule with respect to property within the state. It confers a right to be enjoyed within the jurisdiction."

The further contention that section 671 of the Civil Code is void because in conflict with section 17 of article I of the constitution of the state of California rests for its support upon the argument that the language of the constitution is a limitation upon the power of the legislature. But to give it such an interpretation would be to do violence to fundamental rules of construction. By section 17 foreigners of the indicated classes may not be deprived of the rights which the constitution secures to them. But there is in this no withdrawal from the legislature of its general powers, nor any limitation upon its right to extend similar privileges to other foreigners or aliens. (*State v. Rogers*, 13 Cal. 160.)

It follows from the foregoing that the order of court sus-

taining defendant's demurrer was properly made, and the judgment appealed from is therefore affirmed.

Temple, J., and McFarland, J., concurred.

[S. F. No. 1779. Department One.—January 9, 1900.]

HENRY GRUNDEL, Administrator, etc., Appellant, v.
UNION IRON WORKS et al., Respondents.

TORTS—TORT FEASORS JOINTLY AND SEVERALLY LIABLE—SEVERAL JUDGMENTS—SATISFACTION.—The liability of tort feasers for the same tort is joint and several. They may be sued jointly in one action, or severally in different actions, and several judgments may be rendered either in several actions or in a joint action. No bar arises by the mere rendition of several judgments, or until satisfaction in some form is received, or what in law is deemed an equivalent.

ID.—ACTION FOR DEATH—INJURY UPON GANG PLANK OF VESSEL—LIMITED LIABILITY OF OWNERS—FEDERAL PROCEDURE—SEVERANCE OF ACTION—IMPROPER DISMISSAL.—In an action for death caused from an injury received by reason of an insecure gang plank extending between a schooner and a wharf, by the wrongful act of several defendants, including the owners of the vessel, the fact that such owners availed themselves in the United States district court of the limited liability fixed by the federal statutes, and that the plaintiff appeared therein to claim damages to the extent of the appraised value of the vessel, does not preclude his right to proceed in the superior court against the other defendants, while the proceeding was pending in the federal court; and it was error for the superior court to dismiss the action as to the other defendants, because of such federal proceeding, the plaintiff not having received satisfaction, or the equivalent thereof, in any amount.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Edward A. Belcher, Judge.

The facts are stated in the opinion of the court.

Sullivan & Sullivan, for Appellant.

The court erred in dismissing the action. The liability of the defendants as tort feasers is joint and several, and there may be several actions or proceedings, and several judg-

ments; and there can be no bar until satisfaction is shown. (2 Black on Judgments, sec. 777; Cooley on Torts, 136, 137, 159, 160; *Urton v. Price*, 57 Cal. 270; *Nichols v. Dunphy*, 58 Cal. 605, 607; *Dawson v. Schloss*, 93 Cal. 195, 199; *Butler v. Ashworth*, 110 Cal. 614, 618; *Livingston v. Bishop*, 1 Johns. 290; 3 Am. Dec. 330.)

Wilson & Wilson, for Respondent Union Iron Works.

The surrender of the vessel, or the giving bond in lieu thereof, satisfied the claim of plaintiff against the owners. (U. S. Rev. Stats., secs. 4283-89; *Norwich Co. v. Wright*, 13 Wall. 105; *Walker v. Transportation Co.*, 3 Wall. 150.) A release of one joint tortfeasor releases all. (*Chetwood v. California Nat. Bank*, 113 Cal. 426 et seq; *Turner v. Hitchcock*, 20 Iowa, 310; *McGehee v. Shafer*, 15 Tex. 198; Cooley on Torts, 139.)

Andros & Frank, for other Respondents.

VAN DYKE, J.—The plaintiff brings this action under section 377 of the Code of Civil Procedure of this state, as administrator of the estate of Frank Grundel, deceased, to recover damages on account of the death of the latter, occasioned by the wrongful acts of the defendants. Eighteen defendants were named in the complaint, five of whom are fictitious, and no person appeared or answered in their name. The corporation defendant answered separately, and the twelve other defendants, represented by other attorneys, also appeared and answered. Nine of these twelve subsequently filed a supplemental answer setting forth that they were the owners of the schooner "Gracie S," on or about which the injury occurred, and had made application in the United States district court of the northern district of California for limitation of liability under the provisions of the Revised Statutes of the United States in reference to American merchant marine, and that upon filing their petition in said court a monition was issued in the usual form and served upon the plaintiff and his attorneys, and all persons claiming damages resulting from the accident mentioned in the plaintiff's complaint; and the said court enjoined plaintiff from any further proceedings in the suit in the superior court against the nine defendants claiming to be the owners of said vessel. An appraisal of the schooner was made,

the value being fixed at twelve thousand five hundred dollars. The plaintiff filed his answer in the United States district court to the petition of said nine defendants, but said cause has never been tried in the admiralty court, and is still pending.

The plaintiff made no further attempt to proceed in the superior court against the alleged owners of the vessel, but as to the other defendants who had appeared, to wit, the Union Iron Works, Barber, Castle, and Swanson, the plaintiff elected to proceed to trial in the said court. The case was regularly on the calendar of the superior court for trial December 2, 1897, whereupon the defendant the Union Iron Works, moved the court to dismiss the action as to it, on the ground that nine of the defendants had instituted proceedings in the federal court for limitation of liability, and that said defendant Union Iron Works was sued as a joint tortfeasor with said nine defendants in whose behalf the restraining order had been issued against the plaintiff from proceeding to trial. The court took the motion under advisement, and the trial of the action was continued till April 4, 1898, at which time plaintiff endeavored to proceed with the trial as to said defendants other than the nine who were the owners of said vessel. The Union Iron Works thereupon renewed its motion to dismiss the action upon the grounds stated, and said defendants Barber, Castle, and Swanson, also on the same grounds, moved to dismiss the action. The court granted the motion of said four defendants, and a judgment of dismissal was accordingly entered. The appeal is from this judgment of dismissal, on a bill of exceptions.

The question presented on the appeal is whether the plaintiff, with a cause of action, alleged in the complaint to be for fifty thousand dollars damages, is barred from recovery of a proper measure of damages as against the respondents herein, in consequence of the proceedings in the federal court by the nine defendants, the owners of said vessel, in which their liability is limited to the appraised value of said vessel.

The plaintiff has not actually received satisfaction in any amount, nor what in law is deemed the equivalent of satisfaction.

The law as to the liability of joint tortfeasors is thus stated by Black on Judgments: "The general rule followed

in America is that the liability of two or more persons who jointly engage in the commission of a tort is joint and several, and gives the same rights of action to the person injured as a joint and several contract. Consequently, a judgment recovered against one of two joint tort feasons, remaining unsatisfied, is no bar to an action against the other for the same tort." (2 Black on Judgments, sec. 777.) Judge Cooley, in his work on Torts, second edition, 159, says: "The rule laid down by that eminent jurist, Kent, in *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330, which has since been generally followed in this country, is that the party injured may bring separate suits against the wrongdoers and proceed to judgment in each, and that no bar arises to any of them until satisfaction is received. . . . It is to be observed in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more of the others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has received satisfaction, or what in law is deemed the equivalent." In *Dawson v. Schloss*, 93 Cal. 199, the plaintiff had recovered a judgment in the sum of five thousand dollars against Schloss and Hinkle in an action for malicious prosecution. A new trial was granted as to defendant Schloss, which resulted in a verdict and judgment against Schloss for three thousand dollars, and he appealed from the judgment. At the time of the second trial the original judgment for five thousand dollars against Hinkle was of record and unsatisfied. It was contended by the appellant that no judgment should have been rendered against Schloss on the new trial, so long as the original judgment existed against Hinkle; that while separate suits may be brought against each of joint tort feasons, yet that, if the defendants are sued jointly, there can be but one verdict and judgment. This court answered this contention that "such is not the prevailing rule in the United States." (Quoting from Judge Cooley the above-cited paragraph.) The court, continuing, says: "There is no pretense that any part of the judgment against Hinkle has been paid or satisfied, or even that execution has been taken out upon the judgment." *Nichols v. Dunphy*, 58 Cal. 605, was an action in tort. A judgment had been obtained against de-

fendants. One of the defendants appealed and secured a reversal of the judgment. Thereupon the other defendant against whom execution had been taken out moved for an order quashing the execution. That motion was granted on the theory that there could not be a several judgment when the action had been joint. Discussing the action of the court below this court says: "We think the court erred in quashing the execution against Carmen. The judgment against her was unaffected by the appeal of her codefendant and the subsequent proceedings thereon." In *Butler v. Ashworth*, 110 Cal. 614, it is said: "If one be injured by a tortious act, he is entitled to compensation for the injury suffered, and, if several persons are guilty in common of the tort, the injured one has his right of action for damages against each and all of the joint tort feasons, and may at his election sue them individually or together." In case one of the wrongdoers has become bankrupt or insolvent, the effect as to him would be to limit the liability to the available assets of his estate, which might be merely nominal. His bankruptcy proceeding, however, would not have the effect of discharging the solvent wrongdoers. Nothing short of satisfaction in some form constitutes a bar in a proceeding like the present.

The judgment is reversed and the cause remanded.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1580. Department One.—January 11, 1900.]

CHARLES ASHTON et al., Executors, etc., Respondents, v.
ELIZABETH A. HEYDENFELDT, Appellant.

ESTATES OF DECEASED PERSONS—REVERSAL OF DECREE OF DISTRIBUTION
—RECOVERY BY EXECUTORS FROM DISTRIBUTE—PAYMENT OF PERSONAL DEBTS.—Upon the reversal of a decree of distribution, the assets of the estate paid to the distributee under the decree may be recovered back by the executors. It is no defense to such recovery that a portion of the assets distributed were applied by the distributee in payment of personal debts, and the payees are not required to make restitution.

ID.—PROMPT COMPLAINE WITH DECREE BY EXECUTORS—PRESUMPTION—TITLE OF DISTRIBUTE AND PAYEES.—The executors did not act as their peril in promptly complying with the decree of distribution before the expiration of the time for appeal; but they and all parties interested were entitled to presume that the judgment of distribution was right and would be affirmed. The distributee had a perfect title to the money distributed, and might transfer title thereto by payment to personal creditors at any time prior to an actual reversal of the judgment, which alone could destroy or impair the distributee's right.

ID.—PAYMENT TO CREDITORS—TRANSFER OF BANK CREDITS.—A payment to creditors of the distributee is effected by a transfer of bank credits in a savings bank, and the opening of a new account by the bank and the issuance of a bank-book in the name of each creditor so paid.

ID.—PERSONAL DEBTS TO EXECUTORS—SETTLEMENT AND PAYMENT—RELEASE OF MORTGAGE.—A transfer of bank accounts in the amount of personal debts of the distributee to each of the executors, accompanied by a release of a mortgage securing the same, shows a settlement and payment of such debts by the distributee; and the amount thereof cannot be deducted from a recovery by the executors against the distributee, after reversal of the decree of distribution.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Knight & Heggerty, and George D. Collins, for Appellant.

The money retained by the executors and appropriated in settlement of defendant's indebtedness to them individually, is not deemed paid to the defendant, and cannot be recovered from the defendant by way of restitution, as money had and received to the use of the executors. (*Wharton v. Walker*, 4 Barn. & C. 163; *Lee v. Merrett*, 8 Q. B. 818, 820; *Degraw v. Elmore*, 50 N. Y. 1; *National Trust Co. v. Gleason*, 77 N. Y. 400; 33 Am. Rep. 632; *McClure v. Law*, 47 N. Y. Supp. 84, 20 N. Y. App. Div. 459; *Seymour v. Spring Forest etc. Assn.*, 38 N. Y. Supp. 734; 4 N. Y. App. Div. 359; *Rush v. Good*, 14 Serg. & R. 230; *Herrick v. Hodges*, 13 Cal. 432; *Brent v. Davis*, 9 Md. 217; *Murray v. McHugh*, 9 Cush. 164, 166; *Guthrie v. Hyatt*, 1 Harr. (Del.) 447.) The executors re-

ceived the money at their peril, subject to reversal of the judgment, and are themselves liable to restitution. (*Reynolds v. Harris*, 14 Cal. 681, 682; 76 Am. Dec. 459; *Ex parte Morris*, 9 Wall. 605, 607; *Marks v. Cowles*, 61 Ala. 299, 303; *Adams v. Odom*, 74 Tex. 206; 15 Am. St. Rep. 827; 2 Perry on Trusts, sec. 827; Civ. Code, sec. 2243.) The fact that appellant signed the receipt for \$18,665 is of no consequence. (*Comptoir etc. v. Dresbach*, 78 Cal. 25, 26, 28; *Hawley v. Bader*, 15 Cal. 44.) The executors have no right to offset the defendant's indebtedness to them as against their liability to the estate. (*Freeman v. Lomas*, 5 Eng. L. & Eq. 120; *Bondurant v. Thompson*, 15 Ala. 202; *Irving v. De Kay*, 10 Paige, 319, 324; *Lancaster v. Allen*, 1 Head, 326; *Estate of Watkins*, 121 Cal. 327; *Hinkle v. Eichelberger*, 2 Pa. St. 484.)

Evans & Meredith, and Lester H. Jacobs, for Respondents.

The law looks at the substance of the transaction in determining its character. (*Herman v. Hecht*, 116 Cal. 553.) The transfer of bank accounts, under the circumstances appearing, was a transfer of money, and the whole transaction must be considered as if the defendant had received and paid out the money distributed to her creditors. (2 Greenleaf on Evidence, sec. 117; 2 Ency. of Pl. & Pr. 1016; *Ward v. Evans*, 2 Ld. Raym. 928; *Wade v. Wilson*, 1 East, 195; *Clark v. Pinney*, 6 Cow. 298; *Garr v. Martin*, 20 N. Y. 306; *Beardsley v. Root*, 11 Johns. 464; 6 Am. Dec. 386, and cases cited in note 391.) All that was done under the decree prior to its reversal was valid and binding. (*Bank of United States v. Bank of Washington*, 6 Pet. 8; *Florida Cent. R. R. Co. v. Bisbee*, 18 Fla. 60; *Langley v. Warner*, 3 N. Y. 327; *Butcher v. Henning*, 90 Hun. 535; *Flower v. Beveridge*, 161 Ill. 53.) Executors and trustees are protected in obeying an order of the court. (*Goldtree v. Thompson*, 83 Cal. 420, 422; *Estate of Jessup*, 80 Cal. 626; *Bryant v. Thompson*, 128 N. Y. 426; *Waller v. Barrett*, 24 Beav. 413.)

THE COURT.—Appellant is the residuary legatee under the will of her late husband, Solomon Heydenfeldt, deceased.

On October 23, 1893, the final account of the respondents having been settled, a decree of distribution was entered,

which, after directing the executors to pay to certain persons named in the decree certain specified sums, directed them to pay the remainder of the money in their hands, amounting to the sum of \$18,665.89, to appellant. This sum, excepting a few hundred dollars, was then on deposit in a savings bank to the credit of the estate.

The court found: "That pursuant to said decree said executors paid to said Elizabeth A. Heydenfeldt, the defendant herein, the said sum of \$18,665.89; that thereafter it was determined by the supreme court, and this court finds the fact to be, that the sum of \$10,370 of said amount so paid to said Elizabeth A. Heydenfeldt, was not a part of the assets of said estate, but was the proceeds of an insurance upon the life of said Solomon Heydenfeldt, deceased, payable by its terms to Catharine, wife of said Solomon Heydenfeldt, or to any wife that may survive him, and minor children living at the time of his death; that the remainder of the money so paid to the defendant, to wit, the sum of \$8,295.89, consisted entirely of assets of said estate."

The court further found that on March 15, 1895, said decree of distribution was reversed by this court (*Estate of Heydenfeldt*, 106 Cal. 434), and the matter of the distribution of of said estate was remanded to the superior court for a further hearing; that no further hearing has been had, and no other order or decree of distribution made, and that repayment was demanded by the plaintiffs. The cause was tried and judgment rendered in favor of the plaintiffs for the sum of \$8,295.89. This appeal is from an order denying defendant's motion for a new trial, based upon the ground that certain of the findings are not justified by the evidence.

The evidence on the part of the plaintiffs was, in substance, that after the payment of specific sums directed by the decree to be paid to other parties there remained said sum of \$18,665.89, to which appellant was entitled under the decree; that at that time she was indebted to her counsel, Messrs. Knight and Heggerty, in the sum of \$5,000, and to Pierson & Mitchell, also her counsel, in the sum of \$2,000; that she was also indebted to Julius Jacobs, one of the plaintiffs, in the sum of \$3,781.51, and to Ashton & Gardiner, real estate agents, in the sum of \$7,052, the indebtedness to Jacobs be-

ing for money lent and advanced to her, and to Ashton & Gardiner for advancements and services connected with her real estate; the last two items being secured by a mortgage executed by appellant to Mr. Ashton.

On October 26th Mrs. Heydenfeldt and her attorneys, and the executors and their attorneys, met, and Mrs. Heydenfeldt directed the executors to pay to her said attorneys the said sums due to them, and to discharge her said debts due to Jacobs and to Ashton & Gardiner, respectively. As the bank was not at that time paying deposits, except upon the notice required by its rules, it was agreed between the parties and the bank that a bank-book should be issued to each of these creditors for the amount respectively due to each, and this was done, a book being issued to appellant for the remainder; and she thereupon executed and delivered to the executors her receipt acknowledging that she received from them "\$18,665.89, the residue of the cash on hand in the hands of the executors as shown by their final account, and distributed to me [her] under the decree of distribution entered in the above-entitled action," and Ashton released the mortgage he held as security for her indebtedness to Ashton & Gardiner and to Jacobs.

The transaction as above stated was not controverted by defendant, except that testimony was given tending to show that there was no settlement of the amounts due to Jacobs, and to Ashton & Gardiner, on their personal accounts, but that the receipt was given to facilitate the closing of the estate. We think, however, that the evidence fully sustains the conclusion that there was a full settlement of these accounts, and that they were paid with the consent and by the direction of appellant in the manner above stated. If the bank had failed, the loss would undoubtedly have fallen upon those who had accepted bank-books and thus became depositors; nor could one be well led to believe that the mortgage securing these demands would have been canceled, if the transaction was not regarded by both parties as a full and unqualified settlement and payment.

The argument on behalf of appellant is, however, mainly upon a question of law. Appellant concedes the right of an

executor to maintain an action for property delivered over to a devisee or legatee pursuant to a decree of distribution, subsequently reversed; but it is contended that this right is strictly confined to property constituting assets of the estate "actually delivered" under the decree. If, as we have seen, the money was used with her consent and under her direction to discharge her personal debt and relieve her land from the encumbrance of a mortgage given to secure it, the law will not permit her to say that, as she did not actually receive the money in her hand, she did not receive it at all.

It is further contended, on behalf of the appellant, that "even if she had actually received the money, and then paid it over to respondents in settlement of her indebtedness to them, . . . knowing, as they must be deemed to know, that the decree was subject to appeal and reversal, they, and not she, would be liable for restitution to the estate, as for so much money had and received, and would be chargeable accordingly in the probate proceedings, in the event of a reversal of the decree."

If this proposition is sound, it is difficult to perceive why \$5,000 paid at the same time, and in the same manner, to her counsel who procured the decree of distribution and now represent her on this appeal, should not be refunded to the executors.

It is well settled that the judgment plaintiff, who enforces the judgment, is charged with the duty of making restitution to the defendant of whatever was received on the judgment, if the judgment be afterward reversed. This the appellant concedes; but her contention above stated is, in effect, that the executors against whom a decree of distribution is rendered, and who comply with the command of the court before the time limited for taking an appeal has expired, do so at their peril, for the reason that they must be deemed to have known that an appeal might be taken.

The case of *Langley v. Warner*, 3 N. Y. 327, is directly in point. In that case Walsh recovered a judgment against Langley in a prior action in which Warner, the defendant, was Walsh's attorney. Walsh agreed with his attorney, Warner, that he might retain the amount collected from Langley on execution, and credit it on an indebtedness due

from Walsh to Warner. The money was collected and the credit given. The judgment was afterward reversed, and Langley, the defendant in the first action, from whom the money had been collected, brought the action against Warner to recover the money received by him under the circumstances above stated. The court, by Bronson, C. J., said.

"It was the same thing, in effect, as though the defendant had first paid over the money to Walsh, and the latter had then repaid it to the defendant in satisfaction of his debt. About two months afterward the judgment was reversed, and restitution was awarded to the plaintiffs against Walsh. It was very proper that he should make restitution, for he had, in effect, received the money and applied it to the payment of his debt. The plaintiffs proceeded to execution against Walsh in pursuance of the judgment for restitution; but, failing in that, they now seek to recover the amount from the defendant. I see no principle on which the action can be maintained. The defendant has got none of the plaintiff's money; he has got nothing but his own. Walsh had a perfect title to the money when it was collected—just as perfect as it would have been if no *certiorari* had been issued. He had a right to do what he pleased with the money, and he made a very proper use of it by paying his debt. The plaintiffs have taken up the strange notion that because they were trying to get the judgment reversed Walsh could not give a good title to the money, especially if he paid it to one who knew what they were doing. I am not aware of any foundation for such a doctrine. As Walsh had a good title to the money, he could, of course, give a good title to the defendant, or anyone else. No one was bound to presume that the judgment of a court of competent jurisdiction was erroneous and would be reversed. The legal presumption was the other way—that the judgment was right, and would be affirmed. But if the judgment had been known to be erroneous the pendency of the proceedings in error could not affect, in the least degree, the title of Walsh to the money. Nothing short of a reversal of the judgment could destroy or impair his right."

In *Bank of United States v. Bank of Washington*, 6 Pet. 8, it was said: "It is a settled rule of law that upon an erroneous judgment, if there be a regular execution, the party

may justify under it until the judgment is reversed; for an erroneous judgment is the act of the court.... A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment during the whole time within which a writ of error might be brought."

Appellant cites, upon the point now under consideration, *Reynolds v. Harris*, 14 Cal. 681, 682; 76 Am. Dec. 459; *Ex parte Morris*, 9 Wall. 605; *Mark v. Cowles*, 61 Ala. 299, 303; 2 Perry on Trusts, sec. 827. None of these authorities are inconsistent with *Langley v. Warner*, *supra*, or *Bank of United States v. Bank of Washington*, *supra*, though *Ex parte Morris*, *supra*, appears upon a casual reading to be so. The court said: "If Smith, the district attorney, received from McCrosky any part of the fund ordered to be paid to the latter, the rights of the petitioners followed the money into his hands, and he is liable for it."

The proceeding was against certain bales of cotton, the property of the petitioners, under which they were forfeited to the United States and sold, and the proceeds distributed five per cent to the district attorney, and other parts to other officers, and one-half the remainder to McCrosky, the informer. It was offered to be shown that Smith "had received a large part of the money paid to the informer," who was out of the state. Under the circumstances the word "received" implies a gift or voluntary deposit without consideration, and not the payment of a prior obligation. It would be very strange, if the court meant what appellant seems to think was meant by the language quoted, that no reference was made by the court to *Bank of United States v. Bank of Washington*, *supra*, which is wholly inconsistent with appellant's interpretation of *Ex parte Morris*, *supra*.

Finding no error in the record the order appealed from is affirmed.

[L. A. No. 821. In Bank.—January 16, 1900.]

**In the Matter of the Estate of WILLIAM McDERMOTT,
Deceased.**

APPEAL—OFFICIAL BOND OF EXECUTOR OR ADMINISTRATOR—CONSTRUCTION OF CODE.—Section 965 of the Code of Civil Procedure only permits the official bond of an executor, administrator, or guardian, who is such at the time of taking the appeal, to stand in place of an undertaking on appeal. The averments of such bond do not make it on its face an undertaking on appeal, and the sureties thereon are only liable by virtue of the provisions of that section, and cannot be charged by virtue of that section, unless the case is strictly within its terms.

ID.—APPEAL BY RESIGNED ADMINISTRATRIX—ORDER DISALLOWING ACCOUNTS—ABSENCE OF SEPARATE UNDERTAKING—DISMISSAL.—An appeal from an order disallowing accounts, taken by one who had prior to the appeal resigned the position of special administratrix, and who had requested and secured the appointment of the public administrator in her stead, cannot be sustained by the official bond given by her as special administratrix, regardless of the correctness of the action of the court in making the change without the settlement of her accounts; and in the absence of a separate undertaking the appeal must be dismissed.

ID.—APPEAL BY SURETY—PARTY NOT AGGRIEVED—INTERVENTION—DISMISSAL.—A surety on the bond of an administratrix is not a party aggrieved by an order disallowing her accounts, and has no right of appeal therefrom merely by reason of such suretyship, if not made a party to the record by proper intervention. A petition in intervention by the surety merely for the purpose of appeal from the order, and an allowance thereof by the superior court can have no significance or effect; and the appeal must be dismissed.

MOTION to dismiss appeals from an order of the Superior Court of Los Angeles County disallowing an account of a special administratrix. John L. Campbell, Judge, presiding.

The facts are stated in the opinion of the court.

Miller & Brown, and Albert J. Sherer, for Appellants.

Zach Montgomery, and Leon F. Moss, for Respondents.

McFARLAND, J.—The transcript shows two appeals—one by Carrie McDermott, who was at one time the special administratrix of the estate of William McDermott, deceased,

and the other by the Fidelity and Deposit Company of Maryland, a corporation, claiming to have been surety on a bond of said Carrie as such special administratrix; and the case is now before the court on a motion to dismiss said appeals. The appeals are from an order of the lower court made June 23, 1899, disallowing an account of said Carrie as such administratrix.

There is no bill of exceptions as provided for in rule XXIX of this court, and no attempt to otherwise identify the papers and evidence used on the hearing of the motion in the court below, and therefore one of the grounds of the motion to dismiss, applicable to both appeals, is want of a properly authenticated record on appeal; but we do not deem it necessary to determine whether, in this particular case, the defect in the record is ground for dismissing the appeals, or whether it would only have been ground for affirming the judgment had the whole case been submitted, because we think that each appeal must be dismissed upon other grounds stated in the motion.

One of the grounds for dismissing the appeal of Carrie McDermott is that she gave no undertaking on appeal. The fact that she gave no such undertaking is admitted; but she contends that her bond as special administratrix stands in lieu of an undertaking on appeal under section 965 of the Code of Civil Procedure, which provides that when an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order made in proceedings had in the estate of which "he is the executor, administrator, or guardian," his official bond shall stand in the place of an undertaking on appeal. But when this appeal was taken the said appellant was not the administratrix of said estate. On June 13, 1899, she filed her written resignation as administratrix, and in said resignation requested that C. G. Kellogg, public administrator, be appointed special administrator of the estate. On the same day Kellogg filed his petition for appointment as special administrator, in which he stated that appellant Carrie, who was the widow of the deceased, requested his appointment; and on the next day, June 14th, the court appointed Kellogg as such administrator. This appeal was not taken until August 17, 1899, more than two months after she had resigned and her successor had been

appointed at her request. The covenants of an administrator's bond do not make it, on its face, an undertaking on appeal, and it becomes such, under certain circumstances, only by virtue of the provision of said section 985; and, as a surety always stands strictly on the terms of his contract, he cannot be charged by virtue of the section of the code relied on, unless he be within its strict terms. But the code provision covers only the case of an appeal taken by one who, at the time of the appeal, "is" administrator, and does not include a case where the appealing party is not an administrator. Nor are we called upon to examine the point, now made here by appellant, based upon section 1427 of the Code of Civil Procedure, that the action of the court in accepting her resignation and appointing her successor before her accounts had been settled was erroneous or invalid; having herself invoked that action by the court she cannot now be heard to assail it. For the foregoing reasons her appeal must be dismissed.

2. The appeal of the Fidelity and Deposit Company must be dismissed because it is not a "party aggrieved," who has a right to appeal within the meaning of section 938 of the Code of Civil Procedure. It bases its right to appeal upon the fact that it was surety on the bond of the other appellant, Carrie. The transcript does not really show, by anything that is properly a part of the record on this appeal, that said company was surety on said bond; but, if we assume that to be a fact, it has still no standing here as an appellant. A surety, merely as such, has no right to appeal from a judgment against the principal. In order to be entitled to an appeal under the section of the code above referred to, a person must have been a party to the action or proceeding in the court below. This does not mean that he must have been an original party when the action or proceeding was first instituted, but he must have made himself a party afterward by some appropriate action, and the record must show that he was such a party. This is the general rule, and this case is not an exception. (Hayne on New Trial and Appeal, sec. 203, and cases there cited; *In re Ryer*, 110 Cal. 556.) In the case at bar, this appellant did not seek to intervene, or to appear in any way in the court below before the decision from which he seeks to appeal; nor did he afterward

move to set aside or in any way attack the order. The transcript contains a copy of what is called a "petition in intervention" made by the appellant after the order appealed from in which it prays "that it be permitted to intervene in the above court and cause and become a party thereto for the purpose of appeal from said order to the supreme court of the state of California, and that it be permitted to so appeal"; and there also appears in the transcript what purports to be a copy of an order of the court giving permission to file the intervention, "and to appeal from the order of the superior court," etc. It can hardly be gravely claimed that this petition and order are authenticated parts of the record on this appeal; but, even if they could be so considered, there can be no intervention after trial and judgment, and an order of the court below allowing the appeal has no significance whatever.

The motion to dismiss said two appeals is granted, and both said appeals are hereby dismissed.

Harrison, J., Van Dyke, J., Garoutte, J., Henshaw, J., and Temple, J., concurred.

[L. A. No. 692. Department Two.—January 17, 1900.]

B. H. DENNIS, Appellant, v. FIRST NATIONAL BANK OF SEATTLE, Respondent.

ATTACHMENT—NATIONAL BANK.—Under the national banking act, no attachment can issue against a national bank from a state court.

Id.—POWER OF CONGRESS.—Congress, in the exercise of its power to create national banks, has power to grant them special immunities, and to protect them against attachment and other proceedings in state courts, by which their efficiency may be impaired.

Id.—CONSTRUCTION OF STATE LAWS.—The process of attachment is a creature of the statute; and all of the attachment laws of the states are to be construed as if they contained a proviso in express terms that they are not to apply to suits against national banks.

APPEAL from an order of the Superior Court of Los Angeles County dissolving an attachment. M. T. Allen, Judge.

The facts are stated in the opinion.

Dillon & Dunning, for Appellant.

This attachment was a proceeding *in rem* against a non-resident bank, and the process was essential to the jurisdiction. Congress did not intend to prohibit an attachment in such a case. (*Robinson v. National Bank*, 81 N. Y. 385; 37 Am. Rep. 508; *Holmes v. National Bank of Wilmington*, 18 S. C. 31; 44 Am. Rep. 558.) To deprive a suitor of the remedy by attachment in such a case as this is to deprive him of all remedy, and of any due process of law, which is unconstitutional. (*Kerchoff Mill et. Co. v. Olmstead*, 85 Cal. 81; Cooley's Constitutional Limitations, 365; Works on Jurisdiction, 207, 222; Waples on Proceedings in Rem, 77, 78.)

Mulford & Pollard, for Respondent.

The attachment is void, being in contravention of section 5242 of the Revised Statutes of the United States, which is valid and constitutional, and must control this case. (*Pacific Nat. Bank v. Mixter*, 124 U. S. 721; *Rosenheim Real Estate Co. v. Southern Nat. Bank* (Tenn. Ch., Nov. 20, 1897), 46 S. W. Rep. 1026-28; *Safford v. First Nat. Bank*, 61 Vt. 373; *Freeman Mfg. Co. v. National Bank of the Republic*, 160 Mass. 398; *Garner v. Second National Bank of Providence*, 63 Fed. Rep. 369; *First Nat. Bank of Kasson v. La Due*, 39 Minn. 415; *Bank of Montreal v. Fidelity Nat. Bank*, 112 N. Y. 667; *Chesapeake Bank v. First Nat. Bank of Baltimore*, 40 Md. 269; 17 Am. Rep. 601.)

COOPER, C.—Appeal from order dissolving attachment. The complaint shows the defendant to be a corporation organized under the laws of the United States as a national bank. After the filing of the complaint and an affidavit on behalf of the plaintiff, a writ of attachment was issued and placed in the hands of the sheriff. Defendant made a motion, upon proper notice, for an order dissolving the attachment, upon the ground, among others, that the superior court was without jurisdiction to issue said writ and that the same was improperly issued.

By the amendment of March 3, 1873 (U. S. Rev. Stats., sec. 5242), to section 57 of the national banking act of June 3, 1864, an attachment cannot issue against a national

bank before judgment. The amending act reads: "That section 57 . . . be amended by adding thereto the following: 'And provided further that no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding or municipal court.'"

The words used are plain and mandatory. The supreme court of the United States, in construing the statute in *Pacific Nat. Bank v. Mixter*, 124 U. S. 726, speaking through the chief justice, after reviewing all the statutes bearing upon the subject, said: "That no attachment should issued from state courts against national banks, and all the attachment laws of the states must be read as if they contained a proviso in express terms that they were not to apply to suits against national banks."

This case has since been followed and the same construction placed upon the statute by the state and federal courts without a single exception that has been brought to our knowledge. (*Garner v. Second Nat. Bank of Providence*, 66 Fed. Rep. 369; *Safford v. National Bank of Plattsburg*, 61 Vt. 373; *First Nat. Bank of Kasson v. La Due*, 39 Minn. 415; *Bank of Montreal v. Fidelity Nat. Bank*, 112 N. Y. 667; *Rosenheim Real Estate Co. v. Southern Nat. Bank* (Tenn. Ch., Nov. 20, 1897), 46 S. W. Rep. 1026; *Freeman Mfg. Co. v. National Bank of the Republic*, 160 Mass. 398.)

The section is not unconstitutional. It is not claimed that the act of Congress authorizing national banks is unconstitutional. If Congress has power to authorize the creation of the national banks, it has power to protect them and to regulate their trade and intercourse with others by granting them special immunities, and protecting them against suits or proceedings in state courts by which their efficiency would be impaired. (*Chesapeake Bank v. First Nat. Bank of Baltimore*, 40 Md. 269; 17 Am. Rep. 601; *Freeman Mfg. Co. v. National Bank of the Republic*, *supra*.)

The process of attachment under our code is a creature of the statute. It has always been held that the legislature might provide, not only the cases in which an attachment might issue, but the classes of property upon which it might be levied. It has accordingly been held that money in the custody of the law is not the subject of attachment. This court has held that an act providing for the dissolution of

attachments levied within two months before the filing of a petition in bankruptcy is constitutional. (*Baum v. Raphael*, 57 Cal. 361.)

The legislature of this state has provided, among other things, that courthouses, certain public buildings, and many classes of property shall be exempt from execution. It might provide that no attachment should issue in any case. We see no reason why the legislature of the nation has not the power to provide that no attachment shall issue against any bank created and existing under its authority.

The order should be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. Henshaw, J., Temple, J., McFarland, J.

[S. F. No. 1753. Department Two.—January 18, 1900.]

In the Matter of the Estate of SOLOMON HEYDENFELDT, Deceased. ELIZABETH A. HEYDENFELDT, Appellant, v. CHARLES ASHTON and JULIUS JACOBS, Executors, etc., Respondents.

ESTATES OF DECEASED PERSONS—SALE OF REAL ESTATE—SUFFICIENCY OF PETITION—REVIEW UPON APPEAL.—A petition for the sale of real estate which shows a substantial compliance in all respects with the requirements prescribed by section 1537 of the Code of Civil Procedure, is sufficient to sustain an order of sale upon appeal therefrom; and the petition cannot be assailed upon appeal for any mere uncertainty or inaptness of expression which was not objected to by special demurrer or otherwise in the court below.

ID.—SALE OF UNPRODUCTIVE PROPERTY—WILL—APPLICATION OF PROCEEDS TO DEBTS—FINDING AS TO PROCEEDS—ESTOPPEL.—Upon petition of the executors to sell unproductive property, the proceeds of the sale of which are directed by the will to be applied in payment of debts, a finding that the executors have no proceeds of the sales of such property in their hands is not barred by the estoppel of a former finding, made upon a previous petition of a daughter of the decedent to direct the executors to pay a mortgage debt upon property willed to her, to the effect that the amount then realized from the sales of unproductive property, inclusive of such property then unsold, would largely exceed the mortgage debt. There

can be no element of estoppel in the former finding, where it appears that much of the property had since been used for other purposes, that the former finding was not necessary to the judgment in that proceeding, and that the executors were then on the same side with the appellant who urges the estoppel; and either of these facts is sufficient to preclude the estoppel.

1D.—GENERAL ORDER OF SALE—APPLICATION OF PROCEEDS—PRESUMPTION.—Where the order of sale appealed from included both unproductive and other property, and the sale of the entire property was ordered for the payment of debts, and of large expenses of administration, taxes, etc., it is to be presumed that the court will properly distribute the proceeds of sale, in view of all the facts in the case, and the rights of the parties interested.

APPEAL from an order of the Superior Court of the City and County of San Francisco directing the sale of the real estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Knight & Heggerty, and George D. Collins, for Appellant.

Evans & Meredith, and Lester H. Jacobs, for Respondent.

McFARLAND, J.—The executors filed a petition for an order directing the sale of certain real property of the estate in order to redeem from sale under a decree of foreclosure certain property that had been sold for indebtedness of the testator, and in order to pay charges and expenses of administration, to pay taxes on the property of the estate, etc. Written objections to the petition were filed by Elizabeth A. Heydenfeldt, widow of the testator, and certain other heirs. After a full hearing of the matter, the court, on the 12th of January, 1898, made an order directing certain real property to be sold. From this order the widow, Elizabeth A. Heydenfeldt, appeals.

The points mainly relied on here for a reversal are based on asserted insufficiencies of the petition for the sale. No objections of that character were made in the court below; but appellant contends that the petition occupies the position of a complaint in an ordinary action, which may be assailed at any time on the ground that it "does not state facts sufficient to constitute a cause of action." Assuming, for the purposes of this decision, that this is so, still a complaint cannot be successfully attacked on that ground,

unless it exhibits a total failure to state the necessary facts; the point that a statement is insufficient which is easily understood as an attempted statement of a particular fact, and is merely shadowed by some uncertainty or want of fullness or aptness of expression, can be reached only by a special demurrer or objection in the court below. And in this case, without enumerating here the various objections to it, it is sufficient to say that the petition shows a substantial compliance in all respects with section 1537 of the Code of Civil Procedure, which prescribes what a petition for the sale of property should contain; and "a substantial compliance is enough." (*Stuart v. Allen*, 16 Cal. 474; 76 Am. Dec. 551; *Richardson v. Butler*, 82 Cal. 174; 16 Am. St. Rep. 101; *Burris v. Adams*, 96 Cal. 666, 667; *Burris v. Kennedy*, 108 Cal. 331.)

The will of the testator directs that his debts be paid from proceeds of sales of his unproductive property; and appellant contends that the court was estopped by a finding in a former proceeding from finding in this present proceeding that the executors have no such proceeds in their hands. The former proceeding was a petition of Zeila O. Hellings, a daughter of the testator, for a direction to the executors to pay and discharge certain mortgage indebtedness of the testator, in which she averred that the executors had sufficient funds in their hands to discharge said indebtedness. The executors filed a written opposition to the granting of said petition, and so did the present appellant. In that proceeding the court found, among other things, "that the amount realized as proceeds of sale of the unproductive property of said estate, inclusive of the unproductive property of the estate still unsold, largely exceeds the amount of said mortgage indebtedness, the same amounting, in fact, to the sum of over seventy thousand (\$70,000) dollars." That finding was made on May 27, 1896, and it did not estop the court from finding that there were no funds in the hands of the executors at the time the order now appealed from was made, for various reasons. In the first place, it was not a finding that the executors, even at that time, had, as a product of the sale of unproductive property, the sum of seventy thousand dollars, but only that the proceeds of sale, together with unproductive property then still unsold,

amounted to that sum, and it appears that much of the property has since then been used for other purposes. In the second place, the finding was not necessary to the judgment in that proceeding, and therefore is not an estoppel as against anyone. (See *Lillis v. Emigrant Gap Ditch Co.*, 95 Cal. 553.) In the third place, the present appellant, and the executors who are respondents here, were not on opposite sides in the former proceeding, but were in that proceeding on the same side, and therefore the appellant cannot here invoke the principle of estoppel. (Code Civ. Proc., sec. 1910.)

The court found, upon sufficient evidence, that all the property ordered to be sold is unproductive property, except a tract of land in Tulare county of the value of seven thousand six hundred and eighty dollars; and appellant contends that the order is erroneous, because the product of the sale of the Tulare land, as said land is not unproductive, cannot be applied to the payment of the debt of the testator here sought to be discharged. But the sale was not ordered for the payment of the debt alone. It includes also large expenses of administration, taxes, etc. If the order should have provided that the proceeds of the sale of the Tulare land should be applied to the expenses of administration alone, and that only the proceeds of the unproductive property should be applied to the debt, the only result would be a modification of the order here directing that the proceeds of the sales of the property be thus segregated. It is not to be presumed, however, that the court below will not make a proper distribution of the proceeds of the sales; and as it is fairly contended that the appellant and other persons interested in the estate have heretofore received unproductive property, and the proceeds thereof, which should have been applied to the payment of the said mortgage indebtedness, we do not feel called upon to embarrass the court below by any specific directions in the premises.

The order appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

[S. F. No. 1104. In Bank.—January 20, 1900.]

H. CLIFFORD MORE, Administrator, etc., Appellant, v.
JOHN F. MORE, Administrator of Estate of Alexander
P. More, Deceased, and ELIZA M. MILLER, Special
Administratrix, Respondents.

ESTATES OF DECEASED PERSONS—REMOVAL OF ADMINISTRATOR—INVALID JUDGMENT UPON CLAIM.—After the removal of an administrator from his trust, he ceases to have any connection with the estate, and no judgment rendered against him while removed can bind the estate, or have any validity as evidencing the existence of a claim against the estate.

ID.—APPEAL FROM ORDER OF REMOVAL—SUSPENSION OF ADMINISTRATOR JUDGMENT PENDING APPEAL—VACATING ORDER.—An appeal from an order removing an administrator does not revive or restore his powers, but he remains suspended from office pending the appeal, and has ceased from the date of the removal to be practically and in effect the administrator of the estate, until such time as the order may be reversed. No judgment can properly be rendered against him pending such appeal; and an order vacating a judgment upon a claim so rendered is proper, and must be affirmed.

APPEAL from an order of the Superior Court of the City and County of San Francisco setting aside a judgment against a removed administrator. A. A. Sanderson, Judge.

The facts are stated in the opinion of the court.

Frank R. Whitcomb, and Whitcomb & Boyle, for Appellant.

Thomas McNulta, and A. G. Eells, for John F. More, Respondent.

John B. Mhoon, for Eliza M. Miller, Respondent.

THE COURT.—The plaintiff, H. Clifford More, as administrator of the estate of Lawrence W. More, deceased, brought this action against John F. More, administrator of the estate of Alexander P. More, deceased, to establish his claim of thirteen thousand six hundred and seventy dollars and fourteen cents against the estate of said Alexander P. More, deceased, under section 1498 of the Code of Civil Procedure. On January 15, 1897, judgment was entered for plaintiff for the full

amount of his claim. Afterward John F. More, and Eliza M. Miller, who had been appointed special administratrix of the estate, moved to vacate and set aside the judgment upon the ground that at the time it was rendered the said John F. More was not administrator of the estate. Upon the hearing of the motion it appeared by stipulation that the said John F. More had been on the first day of June, 1896, suspended as administrator, and that on June 4, 1896, Eliza M. Miller had been appointed special administratrix of the estate, and that on the twenty-first day of September, 1896, the court had revoked and annulled the letters of administration which had been issued to John F. More, and that on the twentieth day of November, 1896, the said John F. More had taken an appeal to this court from the order revoking his letters, and that such appeal is still pending. On April 13, 1897, the court granted the motion to vacate the decision and judgment, and made an order annulling and setting the same aside. From this order the plaintiff appealed, and this appeal is the one now before the court, being designated as No. 1104.

When this appeal was submitted to this court in Department there was also another appeal, designated as No. 897, submitted, which was an appeal taken by certain intervenors from the original judgment and from an order striking out their intervention. In an opinion submitted to the court by the commissioners, which covered both appeals, it was recommended that the appeal No. 897 be dismissed, and that in this present appeal, No. 1104, the order appealed from be affirmed. This opinion was approved by the Department and judgment was entered accordingly. Upon a petition for hearing in Bank of both appeals the petition was denied as to No. 697, although the order dismissing the appeal was modified and based upon a ground other than the one taken in the opinion of the commissioners. (See 54 Pac. Rep. 263.) The appeal No. 1104 is, therefore, the only one now pending here in the case.

Upon further consideration of the case, we think that the order appealed from should be affirmed, for the reasons given in the following part of the opinion of the commissioners, which is hereby adopted. That part of the opinion which we hereby adopt is as follows:

"The question involved in the appeal No. 1104 is, Was the judgment rendered against 'John F. More, as the administrator of the estate of Alexander P. More, deceased,' invalid, he having been removed from his trust, and having ceased to be administrator of the estate some months before the judgment was entered? If it was, there was clearly no error in setting the judgment aside on motion. . . .

"It has been held in other jurisdictions that where an executor or administrator is removed from his trust he ceases to have any connection with the estate, and no judgment relating to its affairs can be rendered against him. In *Wiggin v. Plumer*, 31 N. H. 251, it is said on page 266: 'He ceases to be a party to the action on removal from his trust as absolutely as if he were dead, and the action must either be prosecuted against the new representative of the estate, or it will be discontinued. . . . When the administrator is displaced, he ceases to have either interest in or power over that estate, and a judgment to reach the estate must be rendered against the party entitled to represent it. The judgment must also be for a sum to be levied of the goods and estate of the deceased in the hands of the defendant administrator to be administered. Such a judgment cannot be rendered against one who appears by the record not to be administrator.' In *National Bank of Troy v. Stanton*, 116 Mass. 435, it is said: 'Upon her removal from the office of executrix, her ability to and right to defend against this action ceased. It follows that no judgment therein can be rendered against her.' In *Estate of Dunham*, 8 Ohio C. C. 162, it is said: 'We are of the opinion that the judgment, having been rendered after the cessation of the powers of Mrs. Dunham as executrix, was wholly void as evidencing the existence of a claim against the estate.' And in *Taylor v. Savage*, 1 How. 282, it is said by the supreme court of the United States, Taney, C. J., delivering the opinion: 'By this removal from the office of executor he was as completely separated from the business of the estate as if he had been dead, and had no right to appear in or be a party in this or any other court to a suit which the law confided to the representative of the deceased.'

"It is objected, however, for the appellant that the effect of the order removing More from his trust as administrator was

suspended by his appeal therefrom until the final determination of the appeal, and that meantime he continued to be the administrator of the estate. (Citing *In re Moore*, 86 Cal. 72.) That case simply holds that, pending an appeal from an order removing an administrator of an estate, he is suspended from office, and it is within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order or removal becomes final.

"It is true that pending the appeal from the order removing More he was only suspended from the office of administrator. But after the removal he ceased to be practically and in effect the administrator of the estate. He could exercise no powers and perform no duties as such. 'He was as completely separated from the business of the estate as if he had been dead.' The appeal did not revive or in any way restore his powers. 'The effect of an appeal from an order setting aside a judgment is not to revive the judgment. The judgment no longer exists, so far as the assertion of any rights under it is concerned, until it shall be brought into force again by a reversal of the order setting it aside. . . . The code does not provide that an order appealed from shall cease to exist—be annulled—but that it cannot be further enforced by a proceeding upon it. Here the revocation of probate and the surcease of appellant's functions as executor become complete *eo instanti* the order of revocation was entered.' (*Estate of Crozier*, 65 Cal. 332.)

"We conclude, therefore, in view of the well-settled rules of law, that after More was removed from his office as administrator no judgment could properly be entered against him as such administrator, and that there was no error in setting the judgment in question aside."

For the reasons above given the order appealed from in this appeal, No. 1104, is affirmed.

[S. F. No. 840. In Bank.—January 22, 1900.]

A. L. WHITNEY, Respondent, v. AMERICAN INSURANCE COMPANY, and NORTHWESTERN NATIONAL INSURANCE COMPANY, Appellants.

FIRE INSURANCE—POLICY TO MORTGAGEE—NOTICE OF CHANGE OF OWNERSHIP—RECORD OF UNDELIVERED DEED—NONACCEPTANCE.—Under a policy of fire insurance issued to a mortgagee, a condition that the mortgagee shall give notice of any change of ownership in the mortgaged property, is not broken by a failure to give notice of a recorded deed which was never in fact delivered to the grantee, and which he refused to accept, and which did not therefore result in a change of ownership.

ID.—DELIVERY OF DEED—QUESTION OF FACT—INTENTION OF BOTH PARTIES ESSENTIAL.—The delivery of a deed is a question of fact, depending more upon the intention of the parties than upon the mode of fulfilling the intention. The intention both of the grantor and of the grantee that the deed shall operate as a delivered instrument is essential to a delivery thereof.

ID.—PROPOSITION FOR EXCHANGE—DEED TO THIRD PARTY—DELIVERY TO INTERESTED AGENT—REPUDIATION BY GRANTEE.—Upon a proposition for the exchange of property, and for a deed to a third party in settlement of accounts against the proposer of the exchange, a delivery of the deed to the latter and his record thereof as agent of the grantee, while acting in his own interest, and without the knowledge or consent of the grantee or his subsequent approval, cannot operate as delivery to the grantee, and upon his repudiation of the transaction and refusal to accept the deed, no change of ownership is effected thereby.

ID.—ASSUMPTION OF FIRE POLICIES BY NEW COMPANY—ASSENT OF POLICY-HOLDER—ACTION—PRIVITY OF CONTRACT.—The assumption of all the fire insurance policies of an insurance company by a new company is much broader than a mere naked contract of reinsurance under the code; and a holder of a policy issued by the former company sufficiently manifests his consent to the contract by which the payment of the policy was assumed by bringing an action against the new company upon the policy. The law creates the privity necessary for the maintenance of the action.

ID.—JOINT LIABILITY OF COMPANIES.—The old company and the new company assuming its policies are jointly liable upon the policy, and may be sued thereupon as codefendants.

ID.—REVOCATION OF AGENCIES OF OLD COMPANY—PROOF OF LOSS TO AGENTS OF NEW COMPANY.—Where all of the agencies of the old company were revoked and transferred to agents of the new company

which assumed its policies, proof of loss directed to the company which issued the policy, and presented to the authorized agents of the new company within proper time after the fire, is sufficient as against both companies.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

James Alva Watt, for Appellants.

The acceptance and record of the deed by Beach, who was the attorney in fact of the grantee, passed title to the grantee. By the failure of the mortgagee to comply with the condition of the policy as to notice of change, there being no waiver of the condition, there can be no recovery upon the policy; (Civ. Code, sec. 2611; Wood on Fire Insurance, sec. 144; Os-trander on Fire Insurance, sec. 123; *Wenzel v. Commercial Ins. Co.*, 67 Cal. 438; *California State Bank v. Hamburg etc. Ins. Co.*, 71 Cal. 11; *Shuggart v. Lycoming Ins. Co.*, 55 Cal. 408, 414; *Ormsby v. Phoenix Ins. Co.*, 5 S. Dak. 72; *Kabrich v. State Ins. Co.*, 48 Mo. App. 393; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606; 35 Am. Rep. 623; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622; *Galantshik v. Globe Fire Ins. Co.*, 10 Misc. Rep. 369; 31 N. Y. Supp. 32; *Hand v. Williamsburgh Fire Ins. Co.*, 57 N. Y. 41; *Genessee Falls etc. Assn. v. United States Fire Ins. Co.*, 16 N. Y. App. Div. 587; 44 N. Y. Supp. 979; *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 37.) The contract between the American Insurance Company and the Northwestern National Insurance Company was, as between them, a contract for reinsurance, in which parties insured under American insurance policies had no interest. (Civ. Code, secs. 2646-49; *Commercial Union Assur. Co. v. American Cent. Ins. Co.*, 68 Cal. 430.)

Mullany, Grant & Cushing, for Respondent.

There was no change of ownership. Beach, as an agent, could not act under power of attorney for his own benefit, in taking the deed and recording it, without the consent of Taylor. (*Kingston v. Kincaid*, 1 Wash. C. C. 448; *Williams v. Johnston*, 92 N. C. 532; 53 Am. Rep. 431.) Under the cir-

cumstances of this case, both of the insurance companies were jointly liable to the plaintiff upon the policy sued upon. (*Hall v. Nashville R. R. Co.*, 13 Wall. 367; *Plimpton v. Farmers' etc. Ins. Co.*, 43 Vt. 497; 5 Am. Rep. 297; *The Monticello v. Mollison*, 17 How. 152.) Everything was done that could be done in proving the loss.

VAN DYKE, J.—This action is brought jointly against the two companies defendants upon a fire insurance policy issued by defendant, the American Insurance Company, September 6, 1893. The plaintiff is mortgagee of the land upon which the building insured was situated. Judgment went in his favor in the court below, and the appeal is taken from the judgment and an order denying a new trial.

At the date of the issuance of the policy the legal title to the land was in James E. Gordon, who had purchased it from J. F. Sullivan, who, prior to the sale to Gordon, had executed a mortgage to the plaintiff to secure the sum of over eleven hundred dollars. The amount of the policy was a thousand dollars, and the loss, if any should occur, was made payable to the mortgagee. The mortgage clause accompanying the policy provided: "That this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, or by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; . . . provided, also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy."

In December, 1893, Gordon reconveyed the premises back to Sullivan and assigned the policy to him, and this transfer and assignment were approved by the company.

The premises insured were located in the city of Los Angeles, and the policy of insurance was issued by J. K. Mulkey, the agent of the American Insurance Company, residing there at that time. On May 9, 1894, one W. W. Beach, a tenant occupying the premises insured, had some negotia-

tions with Sullivan, the owner, in San Francisco, looking to an exchange of some of his property for the insured property at Los Angeles; and, as a result of such negotiations, Beach requested Sullivan to make a deed of the insured premises to one C. S. Taylor. It seems that Beach expected that Taylor would accept the deed in satisfaction of certain claims which Taylor held against him, Beach. The deed, after being executed by Sullivan and his wife, was handed to Beach, who had it recorded in Los Angeles. Taylor, however, repudiated the transaction and refused to accept the deed.

The building insured was destroyed by fire on May 19th, ten days after the date of the deed from Sullivan and wife to Taylor, and a short time thereafter Beach, who held a general power of attorney from Taylor, as such attorney executed a deed back to Sullivan.

It is claimed on the part of the appellants, and this is really the main ground of defense, that the execution of the deed by Sullivan, as stated, amounted to a change of ownership of the property, and that the defendants did not receive the notice thereof as required by the conditions of the mortgage clause. But the transaction in question did not amount to a change of ownership of the property, and the finding of the court accordingly is abundantly supported by the testimony. The paper executed by Sullivan and wife never took effect as a deed to Taylor. "A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor." (Civ. Code, sec. 1054.) In *Hastings v. Vaughn*, 5 Cal. 316, it was said: "Delivery is a question of fact depending more upon intention than upon the mode of fulfilling the intention." In *Hibbard v. Smith*, 67 Cal. 547, 56 Am. Rep. 726, it was said: "The act, solemn and authentic, done in writing in form apt for the conveyance of land with signature and seal, does not take effect as a deed until delivery with intent that it shall operate. The intent with which it is delivered is important. This restricts or enlarges the effect of the instrument." Even where the grantee is in possession of the deed, though that may raise a presumption of delivery, still "it may be shown by parol evidence that a deed in possession of the grantee was not delivered." (Devlin on Deeds, secs. 294, 295.) The intention as well on the

part of the grantee as the grantor is the controlling element in the question of delivery. (*Black v. Sharkey*, 104 Cal. 279.) Beach testifies that he proposed to Taylor to secure the building by a trade with Sullivan, if possible, and turn it over to Taylor to call certain accounts square, and that he agreed to it; and after getting the property he says he had it deeded to Taylor, but that it burned down before he heard from him, and that he declined to take it. "Q. Did you deliver the deed to him? A. I did not. Q. Was there ever any delivery of the deed to him? A. I simply sent it to the recorder, and it was recorded at my request. He refused to receive it, and I turned it over to Dr. Sullivan when I got the property back." He further testifies that the object in reconveying it to Sullivan was to take the record title out of Mr. Taylor. The consideration for the deed from Sullivan was Beach's entirely. Taylor paid nothing for the property. The transaction was entirely in the interest of Beach, and in handing the paper over to Beach under such circumstances there was no delivery of the grant to Taylor. An agent or trustee cannot transact business entirely for his own interest and bind the principal, or *cestui que trust*, without his knowledge or consent at the time, or subsequent acquiescence and ratification. There being no change of ownership resulting from the transaction referred to, it follows that there was no necessity for any notice.

In March, 1894, a written contract was entered into between the American and Northwestern, by which, in consideration of certain money and property given by the former to the latter and payment by the American to the Northwestern of a certain *pro rata* of unearned premiums, the Northwestern assumed all the liabilities of the American upon all its policies, among which it is admitted the policy in question in this action was included. In the contract between the companies the Northwestern covenanted that it "will make as prompt adjustments and payments of loss, if any, under any and all of its policies of the said American Insurance Company hereby reinsured, as it would under its own policies if issued direct to said assured. Thereafter all the agencies of the American Company in California were revoked, and the Northwestern took the entire control and management of all matters arising out of said policies and

the adjustments of losses in case of fire, and the American Company practically disappeared from business. Some years prior to this agreement the American Company had filed in the office of the insurance commissioner of this state a designation of one Ed. E. Potter, as its agent; but a few days after the fire Sullivan went to see Potter, who informed him that he was no longer the agent of the American, except, perhaps, for the purpose of settling with the Northwestern Company. The proofs of loss were made within five days after the fire, and were directed formally to the American Company, but were sent to George W. Turner at San Francisco, who was the general agent of the Northwestern. The day after the fire, however, the plaintiff, as the mortgagee, called on Mulkey as the agent of the American Company, and informed him of the fire. Thereupon, for the first time, Mulkey stated that he was no longer agent of the said company, that said company's policies on this coast had been assumed by the Northwestern, and that Betts & Silent of Los Angeles were the agents. Soon afterward, Mr. T. A. Nerney called on the plaintiff, and informed him that he was the agent and adjuster of the Northwestern, and took him to the office of Betts & Silent, and there prepared and caused proof of loss to be made in due form, which proof of loss he sent to Turner, as already stated. Turner testifies that, after the contract between the companies, "I had charge of the business covered by that contract, including the risk of policy sued for here and now before this court. As to this policy sued on I began to handle it a week or ten days after the fire. Just as soon as I received the proof of loss from Mr. Nerney I went to work on the subject and called on Mr. Sullivan." He further testified that Mr. Potter had called in all the agencies of the American Insurance Company, and that the Northwestern, "through its agents and under my general agency, had been attending to all the affairs under the policies of insurance issued by the American Insurance Company's agents under this agreement since about April 1, 1894, and it was under that agreement and in pursuance of the duties which were assumed under that agreement that I went to see Dr Sullivan in regard to this policy; and Mr. Nerney attended to the taking of the proofs of loss on behalf of the American Insurance Company at Los Angeles from

A. L. Whitney, the plaintiff herein. I, as agent of the Northwestern National Insurance Company, had authority to receive the proofs of loss under this policy of the American Insurance Company." After Turner had learned from Sullivan that the latter had made a deed to Taylor, and, supposing therefrom that there had been a change of ownership of the property, he returned the proofs of loss on the presumption, presumably, that his company was relieved from liability for want of notice of such change of ownership.

It is argued by appellants' counsel that the contract between the companies referred to, and their subsequent action in carrying it out, amounted to nothing more than a naked contract of reinsurance under the code, which reads as follows: "A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance." (Civ. Code, sec. 2646.) The facts in this case show the contract in question to be much broader than a mere technical reinsurance. In *Arnold v. Lyman*, 17 Mass. 400, 9 Am. Dec. 154, it is said: "The promise being not to Hutchins expressly, but general in its form, the assent of the creditors made them parties to the promise; and this assent is sufficiently proved, as respects the plaintiff, by their bringing an action upon the contracts." (See, also, *Morgan v. Overman etc. Co.*, 37 Cal. 534; *Flint v. Cadenasso*, 64 Cal. 83; *Lockwood v. Canfield*, 20 Cal. 126.)

The finding of the court that under the said agreement between the companies defendants the Northwestern National Insurance Company assumed and undertook the care, control, and management of the business and risks of the said American Insurance Company in this state, including the policy of insurance sued on herein, is fully supported by the evidence. The holders of policies issued by the American Company in this state could avail themselves of said promise and undertaking made for their benefit by the Northwestern Company, and, as said in the cases cited, the bringing of suit is sufficient evidence of assent on the part of the plaintiff to said agreement and undertaking. The law creates the privity necessary for the maintenance of the action. The Northwestern was jointly liable with the American on said policy, and the proof of loss was sufficient.

The other objections to the findings, not being supported by the evidence, are unimportant or immaterial.

The judgment and order appealed from are affirmed.

McFarland, J., Garoutte, J., and Harrison, J., concurred.

Temple, J., dissented.

[Sac. No. 609. Department Two.—January 24, 1900.]

A. OTTO, Respondent, v. MARY E. LONG, Administratrix of Estate of Mary Wood, Deceased, et al., Appellants.

ESTATES OF DECEASED PERSONS—ALLOWED CLAIM UPON NOTE—INEFFECTIVE MORTGAGE NOT DESCRIBED.—An allowed claim upon a note against the estate of a deceased person, which makes no description or mention of a mortgage given by the decedent to secure it, is a valid claim against the estate, where it appears that the mortgage was ineffective, upon the ground that the decedent had no interest in the mortgaged property, either at the time of the mortgage or at any time subsequent thereto.

ID.—ABSENCE OF LIEN—CONSTRUCTION OF CODE—PERSONAL LIABILITY FOR DEBT.—A mortgage of property in which the mortgagor neither has nor acquires any interest creates no lien, and cannot properly be foreclosed; and, in such case, it does not violate the policy established by section 726 of the Code of Civil Procedure to allow a personal action upon the note. The rule that the mortgagee is personally liable for the entire debt should be the same where no lien is created as where the lien has been lost without the fault of the mortgagee.

ID.—NEW MORTGAGE BY DEVISEES—CONSIDERATION—RELEASE OF CLAIM AGAINST SOLVENT ESTATE—EXTENSION OF TIME.—The release and acknowledgment of satisfaction and discharge of the claim upon the note against the solvent estate of the decedent, and the extension of time to the devisees as the sole parties in interest in which to pay the debt, is a sufficient consideration for the execution of a new and valid mortgage by the devisees upon the property in fact owned by them, which was described in the first ineffective mortgage executed by the decedent.

ID.—IMMATERIAL MISTAKE AS TO SOURCE OF TITLE.—The mutual mistake of the mortgagors and mortgagee in supposing that the mortgaged property belonged to the estate of the decedent, that the original mortgage executed by the decedent was valid, and that the devisees acquired title from his estate, where as in fact they owned it by an independent title, is immaterial, so far as respects the consideration for the mortgage executed by them, and the validity and effectiveness of their mortgage.

Id.—MISTAKE AS TO REMISSION OF PART OF DEBT—MISCALCULATION—
NEGLECTED IGNORANCE.—A mutual mistake of the claimant of the note against the estate and the devisees as to the amount due, based upon a miscalculation by the claimant, each supposing that the devisees in executing the new mortgage were receiving the benefit of a reduction of four hundred dollars, the debt being in fact less than the face of the mortgage, cannot affect the validity of the mortgage for the sum actually due. The allowed claim having included a copy of the note with the credits thereon, the mortgagors were as chargeable as the mortgagee with information as to the amount of the debt; and their failure to compute the interest and their ignorance of the truth was the result of their own gross negligence.

APPEAL from a judgment of the Superior Court of Lassen County. C. E. McLaughlin, Judge, presiding.

The facts are stated in the opinion of the court.

Goodwin & Goodwin, for Appellants.

There was no consideration for the note of Mary Wood secured by the new mortgage. She was under no obligation to pay the debt of her deceased husband. (*Rosenberg v. Ford*, 85 Cal. 610; *Sullivan v. Sullivan*, 99 Cal. 193; *Chaffee v. Browne*, 109 Cal. 211, 220; *Blythe v. Robison*, 104 Cal. 241.) The mortgage of Allen Wood purported to be a security, and section 726 of the Code of Civil Procedure applies, whether the security was adequate or not. (*Barbieri v. Ramelli*, 84 Cal. 154; *Bartlett v. Cottle*, 63 Cal. 366; *Biddell v. Brizzolara*, 64 Cal. 354.) The claim upon the note without any mention of the mortgage was invalid. (Code Civ. Proc., secs. 1493, 1497, 1500; *Ellis v. Polhemus*, 27 Cal. 350; *Verdier v. Roach*, 96 Cal. 467; *Bank of Sonoma Co. v. Charles*, 86 Cal. 322; *Evans v. Johnston*, 115 Cal. 180.) The new note and mortgage were not payment of the old, not having been expressly agreed upon as payment. (*Griffith v. Grogan*, 12 Cal. 317; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15; *Savings etc. Soc. v. Burnett*, 106 Cal. 530.) The note being without consideration the mortgage falls with it. (*Sawtelle v. Muncy*, 116 Cal. 439.) The new note and mortgage having been made under a mutual misapprehension of material facts, they must fail for want of free and full consent. (Civ. Code, secs. 1565, 1567, 1576-78; *Rosenberg v. Ford*, *supra*; *Rued v. Cooper*, 119 Cal. 463; 2 Pomeroy's Equity Jurisprudence, sec. 849.)

Spencer & Raker, and H. D. & G. S. Burroughs, for Respondent.

The allowed claim had the effect of a judgment which must be paid in due course of administration, and charged the property of the estate with payment thereof. (Code Civ. Proc., secs. 1497, 1504, 1516; *Estate of Hidden*, 23 Cal. 363; *Estate of Glenn*, 74 Cal. 567.) The security being valueless, the claim for the note was properly allowed. (*Williams v. Hahn*, 113 Cal. 475-77; *Savings Bank v. Central Market Co.*, 122 Cal. 28; *Blumberg v. Birch*, 99 Cal. 416; 37 Am. St. Rep. 67; *Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 490, 494.) Where the reason is the same, the rule should be the same; and the law requires no idle acts. (Civ. Code, secs. 3511, 3532.) Even if the mortgage was valid, the presentation and allowance of the note would keep the mortgage alive as an incident of the note. (*Consolidated Nat. Bank v. Hayes*, 112 Cal. 75-82; *Sonoma Co. Bank v. Charles*, 86 Cal. 322; 8 Am. & Eng. Ency. of Law, 2d ed., 1072; *Cannon v. McDaniel*, 46 Tex. 303; *Danzey v. Swinney*, 7 Tex. 627.) The payment of the valid claim against the solvent estate was a sufficient consideration for the note and mortgage by the devisees, to the actual extent of the debt. There was a complete novation which extinguished the old obligation. (Civ. Code, secs. 1530, 1531.)

TEMPLE, J.—This action was brought to foreclose a mortgage given by the decedent in her lifetime and by the other defendants.

The important facts are these: Allen Wood, who was then the husband of the intestate Mary Wood, in 1888 gave to plaintiff, to secure an indebtedness due from himself to plaintiff, his promissory note and what purported to be a mortgage upon land in which he had no estate, title, or interest of any kind or character, and which was then and has ever since been owned and occupied by the defendants Mary E. Long and W. B. Long as and for their homestead. Allen Wood died in 1890, testate. The purport of his will is not made to appear, but counsel on both sides assume that his widow, Mary Wood, and Mary E. Long, who was his daughter and only child, were interested in his estate.

He left a solvent estate, and among his assets were: 1. A tract of land which was a declared homestead; and 2. Eighty acres not included in his homestead.

Mary Wood, then his widow, was appointed administratrix with the will annexed, and duly qualified. Notice to creditors was published and in due time, August 7, 1891, plaintiff presented for allowance his claim founded upon the note, but made no mention of the mortgage. It was duly allowed both by the administratrix and by the judge, and was filed.

On the first day of December, 1893, the said Mary Wood and the defendants Long executed to plaintiff the mortgage upon which this suit was brought, which was given to secure the debt due from the estate of Allen Wood, and there was no further or other consideration for the same than the indebtedness of the estate of Allen Wood to plaintiff. All parties at the time of the transaction believed that the land covered by the mortgage belonged to Allen Wood when the first mortgage was given and constituted a part of his estate at the time the note in suit was given; also that the claim had been properly presented to his administratrix and was properly allowed, and was a valid claim against the estate, both as to the note and the mortgage. All parties also believed that there was then due upon the original note about two thousand nine hundred dollars, and that in accepting the new note and mortgage in lieu of the old one plaintiff remitted about four hundred dollars of the indebtedness to him. As a matter of fact, the amount due plaintiff was then only two thousand three hundred and twenty-one dollars.

Defendants did not discover any of these mistakes until after this action was commenced.

It is not found that Otto believed at the time the new note was given that the land described in the mortgage of Allen Wood belonged to the estate, but he certainly knew that Mary Wood and the defendants were acting under that belief, and he did not inform them of their mistake. In his receipt given in discharge of the old debt he describes it as a claim secured by mortgage. It is probable that when the first mortgage was accepted by Otto he supposed that the land was the property of Wood, but it is possible that when he presented his claim to the administratrix he had discovered the truth, and therefore did not present the mortgage.

Practically, the only defense which the defendants make is that there was no consideration for the new note and mortgage. And this is based upon the proposition that as the obligation of Allen Wood was secured by mortgage, and the mortgage was not described in the claim, as the statute directs that it should be, the allowance is absolutely void, and it has been decided in this state that a wife is not even morally bound for the debts of her husband, and that her note for his debt, where there is no new consideration, is void. (*Rosenberg v. Ford*, 85 Cal. 610; *Sullivan v. Sullivan*, 99 Cal. 193; *Chaffee v. Browne*, 109 Cal. 211.)

Appellants concede that if Otto had a valid claim against Allen Wood's estate, and the claim was paid by the new note and mortgage, there was a valid consideration, but they deny both propositions.

Respondent accepts these as the true issues involved, subject to his contention that the court found that there was an adequate consideration and did not find that there was a mutual mistake. Respondent contends, however, that the debt of Allen Wood to plaintiff was not secured by a mortgage, and, therefore, it was properly presented and allowed. Section 726 of the Code of Civil Procedure provides: "There can be but one action for recovering any debt, or the enforcement of any right secured by mortgage upon real estate, which must be in accordance with the provisions of this section," etc.

Admittedly, Otto could not waive his security, if security he had, and bring a personal action to recover his debt. And it is also admitted that, if the debt was so secured, it was not presented as required by section 1496 of the Code of Civil Procedure. It is also agreed that Allen Wood had neither title nor possession to the mortgage premises when he gave the mortgage, and that he acquired none subsequently. In reality, it never did amount to security, and yet the instrument was not wholly void. Had Allen Wood acquired any interest in the mortgaged premises during the natural life of the contract the lien of the mortgage would at once have attached to it. An after-acquired title feeds the security.

The policy which led to the enactment of section 726 has been often stated. The matter is discussed in *Toby v. Oregon etc. R. R. Co.*, 98 Cal. 490, where attention is called to some

actions which could formerly have been maintained by a mortgagee after breach of the contract on the part of the mortgagor. The ends accomplished by the section, it is said, are: 1. To confine the mortgagee to one action; 2. To make the security the primary fund from which satisfaction is to be made; and 3. To give plaintiff a judgment for the deficiency, if any, remaining after exhausting the security.

Appellant relies almost entirely upon a remark found in *Barbieri v. Ramelli*, 84 Cal. 174, as follows: "The proper construction of the language of the statute is that, if the mortgage on its face purports to be a security to the plaintiff, then he must bring his action for foreclosure. This word has reference to the purport of the mortgage as it appears upon its face. The interpretation is not proper when its meaning is sought in something outside of the mortgage instrument."

In that case the plaintiff held a third mortgage and brought a personal action to recover his debt, and claimed the right to disregard the mortgage because, as he contended, the amount due on the prior mortgages exceeded the value of the security. The ruling was to the effect that so long as he had a lien on real property given as security he must foreclose. In effect, this is saying that a foreclosure and sale is the special mode provided for determining whether there is anything for a particular mortgagee in the property subject to the lien. This position seems to follow from *Biddel v. Brizzolara*, 64 Cal. 354, and other cases which hold that the liability of a mortgagor is only to pay any deficiency which there may be after foreclosure and sale of the mortgaged premises. That is to say, so long as there is an unexecuted lien on property to secure the debt a personal action cannot be maintained. To inquire whether there is such property as that which the mortgage purports to cover, or whether, for any reason, it failed to create a lien, is not to violate the rule announced in *Barbieri v. Ramelli*, *supra*, nor the policy of the statute. If it can be made to appear that there is no such property as that which the mortgage purports to describe, it would demonstrate that there was no lien, and the debt would not be one secured by mortgage upon real estate. If, when the mortgagor executed the mortgage, he had neither possession, or any estate, title, or interest of any

kind or character in the mortgaged premises, and never at any time acquired any, it is equally evident that the debt is not one secured by a lien upon real estate. One cannot by his contract create a lien upon property which he does not possess, and to which he has no title of any character whatever. If the mortgagor was in good faith asserting a claim to the property, or had color of title, or was asserting an equity in reference to it, perhaps the mortgagee would be compelled to foreclose. Here, confessedly, the mortgagor had no claim of title. Nor was the mistake, if there was one, such as could be corrected in a court of equity. Wood did not, so far as appears, describe the wrong tract of land. He was apparently under the impression that he had acquired title to the land from the United States, whereas his daughter and son in law had applied for and had received a patent for the land. It does not appear that there was any misrepresentation or fraud, or any mistake other than that above stated. And, strange as it may appear, the widow, the daughter, and son in law thought the land belonged to the estate of Allen Wood when they gave the second mortgage, and supposed they were creating a lien upon the property to which they had succeeded as devisees or heirs of Allen Wood, and not upon their own property acquired by purchase.

Under such circumstances it does not violate the policy established by section 726 to allow a personal action upon the note. It is not altogether or literally true, as declared in some of the cases, that the mortgagor only undertakes to pay the deficiency which may remain after the return is made of the result of the sale on foreclosure. He undertakes to pay the debt, but if there exists a valid lien to secure its payment the result is the same as though his contract had been only to pay the deficiency. If, however, without fault on the part of the mortgagee the lien be lost, he may be held for the entire debt. (*Savings Bank v. Central Market Co.*, 122 Cal. 28.) And if by some mistake the mortgagee does not get a lien upon anything, the rule should be the same.

Why should he go through the senseless form of foreclosure, when confessedly he does not really have a lien? It may even be doubted whether he could or would be permitted formally to foreclose, and in pursuance of a decree offer for

sale land belonging to a third party, when his mortgagor neither had or asserted any title or claim, in law or equity, with reference to the property. Such a proceeding would tend to cloud land titles, and surely the policy of the law cannot require it.

The claim as presented and allowed being a valid claim against the estate of Allen Wood, deceased, it is admitted that it was a sufficient consideration for the new note and mortgage, provided it was surrendered and given up as paid by the new note. It is contended that there was no express agreement that the acceptance of the new note should operate as payment of the old note. It is averred in the answer, and found, that plaintiff importuned Mrs. Mary Wood for a new note in lieu of the old, and threatened to bring suit upon his note and mortgage and put the estate to great expense; that to prevent this Mrs. Wood proposed to execute the new mortgage "in lieu of the claim and demand of said Otto against the estate of Allen Wood, deceased, if said Otto would forego the foreclosure of said mortgage and surrender the note," etc., and that Otto accepted said proposition, and "pursuant thereto the note and mortgage described in the complaint herein were executed and delivered to plaintiff."

It is also found that before the new note and mortgage were delivered Mrs. Mary Wood was informed that the old note had been lost, and therefore could not be given up, and thereupon Otto gave a receipt as follows:

"Law Office of Goodwin & Goodwin.

"Susanville, Cal., March 26, 1894.

"Received of Mrs. Allen Wood, administratrix of the estate of Allen Wood, deceased, the sum of twenty-eight hundred and sixty-two dollars, being payment full and complete satisfaction and discharge of claim of undersigned against said estate, for promissory note and mortgage dated the 18th day of December, 1888, for \$4,230.30-100, and recorded December 18, 1888, in Vol. E. of Mortgages, page 332-3 and 4, Lassen county records.

"(Signed) ANTHONY OTTO."

The point is, that the receipt specifies that it is received in payment of the claim but not of the note, which it is said left him free to foreclose the mortgage which he might do though the claim against the estate was not presented or allowed. There is nothing in this. Satisfaction and discharge

of the claim on the note is payment of the note, unless it is otherwise expressed.

Appellant contends that there was a mutual mistake as to other matters and that the contract was based upon mutual misapprehension. The main point is that in the compromise all parties understood that Otto was remitting four hundred dollars justly due him, and one inducement for the defendants to give new security for the debt was their conviction that thereby they were gaining four hundred dollars. They thought Otto was paying them four hundred dollars as an inducement. Unless Otto could have made his money out of the estate, there was no foundation for such belief. Otto's claim had been filed. It included a copy of the note and the credits. In Otto's affidavit it was stated that the amount due was two thousand two hundred and ninety-five dollars and twenty-three cents, which it seems was about fifty dollars too much. The misapprehension or mistake made by Otto was in regard to matters in reference to which Mrs. Wood and her attorney were as well informed as Otto was. Their ignorance of the truth was the result of gross negligence. The court rendered judgment only for the sum actually due. The failure of Mrs. Wood and her attorneys to compute the interest shows that they did not consider that a matter of much consequence in the compromise. As it is found that the estate was solvent, and it is assumed here, as it must have been in making the compromise, that Mrs. Wood and the defendants were the only persons interested in the estate of Allen Wood, they were practically getting an extension of credit for their own debt.

Under the circumstances I think defendants should not be relieved from their obligation.

The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[Sac. No. 635. Department Two.—January 29, 1900.]

P. GILLON, Administrator of Estate of Mary McNulty, Deceased, Appellant, v. NORTHERN ASSURANCE COMPANY OF LONDON AND ABERDEEN, Respondent.

FIRE INSURANCE—BREACH OF CONDITION OF POLICY—DEED TO AVOID PROBATE EXPENSES—LOSS AFTER DEATH OF INSURED.—Under a policy of fire insurance containing the usual provisions avoiding the policy in case of change of title in the property insured, a deed made by the insured person a few days before death to a brother in order to avoid probate expenses, without a transfer of the policy, avoids the policy from the time when the deed becomes effective, whether at its date, or at the death of the insured, and no recovery can be had thereupon by the administrator of the insured person for a loss occurring after the death.

ID.—NOTICE OF TRANSFER—GOOD FAITH.—Notice of the transfer given to the agent of the insurance company before the fire, and the good faith of the transfer cannot alter the effect of a violation of the condition of the policy, or aid the administrator of the insured person to recover upon the policy.

ID.—INSURANCE UPON PERSONAL PROPERTY—PREMATURE ACTION—PROOFS OF LOSS.—Where, by the terms of the policy, it was not payable until sixty days after proofs of loss had been received by the company, an action to recover for the loss of personal property insured, brought within the period of sixty days after the presentation of the proofs of loss, is premature, and cannot be maintained.

ID.—WAIVER OF TIME FOR PROOF.—The waiver of time limited for the presentation of proofs of loss is not a waiver of the requirement of proofs, nor of the condition for payment within sixty days after the making of the proofs of loss.

ID.—PLEADING—PRESENTATION OF PROOFS OF LOSS—WAIVER NOT ALLEGED.—Where the complaint avers that the proofs of loss were presented more than sixty days before the commencement of the action, and does not aver or count upon a waiver of the proofs of loss, such waiver cannot be relied upon to sustain the action.

APPEAL from a judgment of the Superior Court of Solano County and from an order denying a new trial. A. J. Buckles, Judge.

The facts are stated in the opinion.

John M. Gregory, for Appellant.

Van Ness & Redman, for Respondent.

GRAY, C.—This is an action on a fire insurance policy. The defendant had judgment, and the plaintiff appeals from an order denying him a new trial. The policy was issued to Mary McNulty, and by it her two frame houses and one shed were insured for one thousand and twenty-five dollars, and her household furniture and wearing apparel for three hundred dollars. Thereafter Mary McNulty, by deed, conveyed the said houses and shed and land on which they were situated to her brother, P. Gillon, to avoid the expense of probating her estate. A few days later Mary McNulty died, and thereupon her said brother took possession of said real property and held the same for nearly two months, when the whole of said personal property and two of the buildings were destroyed and the other building was badly damaged by fire. Before the death of his sister Gillon notified defendant's Vallejo agent of the transfer of the buildings to himself, but no transfer of the policy was ever effected. The personal property belonged to Mary McNulty at her death, and when destroyed was a part of her estate. Immediately after the fire, Gillon notified defendant thereof, and an adjuster was sent to ascertain the amount of the loss. During his investigations, the adjuster obtained knowledge of the said transfer to Gillon, and reported the same to defendant. The next thing of importance in reference to the matter occurred between the attorneys for the respective parties. Forty-one days after the fire the attorneys of defendant wrote to the attorneys of plaintiff saying that defendant was not liable for the injury to the buildings, giving reasons therefor, and as to the personal property they said: "We will endeavor to reach a settlement with you in regard to the loss of the personal property as soon as a representative of the estate has been appointed." Nothing further was done until upward of seven months thereafter, when the plaintiff, as administrator, made a demand in writing for the whole amount of the insurance, and to this demand the attorneys for defendant replied by letter, the material part of which is as follows:

"We stated to your attorney, Mr. Hall, as far back as last August, that we were ready to take up for adjustment the loss

on the second and third items of the policy—the personal property—as soon as an administrator of her estate had been appointed. Why you have delayed taking any action in the matter for this long period of time we do not know, and your failure to present the statement and proof required by the policy within sixty days after the loss has probably worked a forfeiture of all rights under the policy. But, without regard to this failure on your part to comply with the terms of the policy, the company is now, as it always has been, ready to settle and pay the loss on the personal property. In order that it may be advised as to the extent and nature of this loss, it will be necessary for you to furnish to the company the verified statement called for by the policy, giving, among other things, an itemized list of the insured furniture and wearing apparel claimed to have been damaged or destroyed by the fire, the cash value of each item thereof, and the amount of loss thereon.”

Eighty-five days subsequent to the date of this letter, and one year, lacking seven days, after the fire, the plaintiff for the first time furnished defendant with a proof of loss, and three days thereafter this suit was begun. The policy contained the usual provisions voiding the contract of insurance in case of any change of title in the property insured, requiring proof of loss within sixty days after a fire, and that nothing should be payable until sixty days after such proof of loss had been received by the company. The complaint alleged that “more than sixty days prior to the commencement of this action the defendant was furnished with due proofs of said loss for and on behalf of said estate,” and no effort was made to amend such complaint.

1. The conveyance of the buildings by the insured operated to transfer the title in the property to Gillon either at the date of the deed or at the time of the grantor's death. It is unnecessary to consider at which of these dates the title vested in Gillon, for both occurred before the fire. It is not contended that this deed was invalid or that it did not transfer the property to Gillon, but all that appellant says about the clause as to a transfer of title is this: “We claim that the notice to defendant's Vallejo agent before the fire was sufficient to relieve us from the operation of this clause, the transfer being in the best of faith and the risk becoming no greater by the transfer.” The appellant evidently forgets

that this suit is brought on behalf of the estate of Mrs. McNulty, and not on behalf of Gillon. The notice of the transfer could in no way assist Mrs. McNulty or her estate, in recovering insurance on property the title to which she had parted with contrary to the provisions of the policy. Good faith in the transaction could not alter its effect as a violation of such provisions.

2. The appellant was not entitled to recover for the personal property for the following reasons: It has been held by this court in two well-considered cases that a complaint in an action on a policy of fire insurance, which failed to show that proofs had been made in accordance with the provisions of the policy sixty days before action begun, did not state a cause of action on such policy. (*Doyle v. Phoenix Ins. Co.*, 44 Cal. 264; *Cowan v. Phoenix Ins. Co.*, 78 Cal. 181.) In another case it is held that a nonsuit was properly granted in an action on a policy similar to this where the evidence showed that the suit was commenced before proofs were made. (*McCormack v. North British Ins. Co.*, 78 Cal. 469.) It is undoubtedly the settled law that a suit commenced within the sixty days, given by the policy for payment of the loss after proofs are made, is prematurely brought. This rule is recognized by appellant in his complaint when he states that due proofs of loss were furnished more than sixty days before the commencement of this action, but the evidence and findings are against him on this proposition. Of course, this proof of loss may, like any condition of a contract, be waived. But here, again, both the evidence and the findings as to the waiver are against appellant's contention. The denial of liability as to the real property, and, coupled with it, the express admission of liability as to the personal property, could only be treated as a waiver as to such real property. It surely could not be treated as a waiver of proof of loss as to the personal property. (*Milwaukee etc. Ins. Co. v. Winfield*, 6 Kan. App. 527.) Section 1486 of the Civil Code, cited by appellant, has no application to this subject. The letters in evidence show a waiver only as to the time within which proofs of loss as to the personal property may be furnished. They show no waiver of the making of the proofs, but, on the contrary, it is insisted in one of them at least that such proofs be thereafter made, even though the time for making them under the policy had expired.

There being no waiver of the requirement of proofs of loss as to the personal property, and certainly no waiver of the provision of the policy that the loss was not payable until sixty days after its ascertainment and proof, we think the trial court was right in its conclusions and that the action as to the personal property was prematurely brought.

If the appellant were correct in his contentions as to a waiver being disclosed by the evidence, it is still difficult to see how we could be justified in disturbing the findings and judgment in the case when appellant nowhere in his complaint counts on such waiver, but alleges the actual furnishing of proofs and that they were furnished sixty days before action begun. (*Rogers v. Kimball*, 121 Cal. 247.)

We advise that the order appealed from be affirmed.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Henshaw, J., Temple, J., McFarland, J.

[S. F. No. 1961. Department Two.—January 29, 1900.]

C. C. SWAFFORD, Appellant, v. BOARD OF EDUCATION OF CITY OF PETALUMA et al., Respondents.

APPEAL—REVIEW—ARGUMENT.—Upon appeal from a judgment and from an order denying a new trial, the appeal from the judgment cannot be considered if taken too late; and the sufficiency of the evidence will not be reviewed upon appeal from the order denying the new trial, where the brief of the appellant relies only upon alleged errors of law, occurring at the trial.

ACTION FOR BREACH OF CONTRACT—DISCHARGE FROM EMPLOYMENT AS TEACHER—EVIDENCE—EMPLOYMENT OF PREDECESSOR.—In an action against a board of education, and the members thereof, to recover as damages for the breach of an alleged contract of employment as teacher for a stated period at a fixed salary, the amount of salary which would have been received if plaintiff had not been discharged, evidence of the employment of plaintiff's predecessor at the same monthly salary, and of his continuing to act for one year, and of his resignation, and the choice of plaintiff as his successor,

is irrelevant and immaterial, and does not tend to prove the contract alleged.

ID.—GENERAL OFFER OF EVIDENCE.—Where an offer of evidence includes many different propositions grouped together, if the proof of any proposition is incompetent, irrelevant, or immaterial, the ruling of the court in rejecting the entire offer must be sustained.

ID.—EVIDENCE OF SPECIAL MEETING OF BOARD—CHARGES OF UNPROFESSIONAL CONDUCT—GENERAL MOTION TO STRIKE OUT.—Evidence received of a special meeting of the board of education to investigate charges of unprofessional conduct against the plaintiff, prior to his discharge, is not reached by a general motion "to strike out the testimony thus far introduced, partially upon the ground that it appears that no notice had been given" to a certain member of the board of education. The motion is broad enough to include all the evidence in the case, and was correctly denied.

APPEAL from a judgment of the Superior Court of Sonoma County and from an order denying a new trial. S. K. Dougherty, Judge.

The facts are stated in the opinion.

H. G. Walker, for Appellant.

J. P. Rogers, and F. A. Meyer, for Respondents.

COOPER, C.—This is an appeal from a judgment and an order denying motion for a new trial. The complaint alleges that in the month of December, 1894, the defendant, as a corporation, "by a resolution duly elected and employed the said plaintiff as teacher of the Petaluma High School" for the term of six months, commencing on the first day of January, 1895. "That the salary and compensation attached to the position of teacher of said school, and which the said plaintiff was to receive according to the terms of said resolution and contract of employment, was one hundred and sixty-five dollars per month for said term of six months." That plaintiff entered upon his duties as such teacher and taught said school up to February 20, 1895, when defendant paid him two hundred and forty-seven dollars and fifty cents, being his salary in full up to said time, and, that the defendant then wrongfully discharged him and refused to allow him to complete his term under his contract. Damages are asked in the sum of seven hundred and forty-

two dollars and fifty cents, being the amount that it is claimed plaintiff would have earned at the rate agreed upon if allowed to complete his term according to contract. The case was tried without a jury. The learned judge of the court below, after hearing the evidence, found that the defendant never, by resolution or otherwise, employed the plaintiff for the term specified, or for any other term, and that no fixed salary or compensation was attached to the position of such teacher. That the defendant never wrongfully or in any manner prevented plaintiff from performing any services or duties, and that plaintiff has not been damaged by defendants in any sum or at all. Judgment was accordingly entered against plaintiff March 7, 1898. The notice of appeal from the judgment was not served or filed till April 11, 1899, and counsel for defendants object to the appeal from the judgment being considered because not taken within the time prescribed by statute. The plaintiff's attorney concedes that the appeal was not taken in time and therefore the appeal from the judgment will not be considered. This leaves for consideration the appeal from the order denying the motion for a new trial. The attorney for plaintiff in his opening brief says that he "will not touch upon matters respecting the judgment in so far as a reviewing of the evidence is concerned, but will direct attention to errors of law upon which appellant relies." It will, therefore, be assumed that the findings are supported by the evidence and that the judgment is the legal conclusion from the facts found.

It is urged as the principal ground for reversal of the order denying the new trial that the plaintiff offered to prove that by resolution of defendant passed on the thirtieth day of June, 1890, the salary of the principal of the said high school was fixed at one hundred and sixty-five dollars per month, and that the court erred in refusing to hear such proof. The record illustrates the position in which counsel are often placed by offering to prove certain facts in order to save exceptions instead of asking the questions and taking a ruling upon the questions so asked. In this case it appears that after the close of defendants' evidence the plaintiff was called in rebuttal. After some discussion as to whether or not the offered evidence was in rebuttal, the court, in the

exercise of its discretion, allowed the plaintiff's attorney to offer it as part of his evidence in chief. The offer covers some five folios of the transcript, and it is not necessary here to give it in full. Among other things, counsel for plaintiff "offered to prove" that on the thirtieth day of June, 1890, I. S. Crawford was principal of the Petaluma High School and continued as such until the twenty-ninth day of June, 1891. That by resolution passed on the thirtieth day of June, 1890, the salary of the principal of said school was fixed at one hundred and sixty-five dollars per month. That Professor Crawford continued to teach until June 29, 1891, when his resignation was received and, on motion, accepted. That the board then proceeded to ballot for his successor. That the names of several candidates were proposed, and, upon ballot being taken, plaintiff was elected as successor of said Crawford. That plaintiff thereupon entered upon his duties as teacher and continued to teach up to the sixteenth day of February, 1895, receiving one hundred and sixty-five dollars per month during all that time. That the salary of plaintiff was paid by warrants drawn by the board of education upon the treasurer of the city of Petaluma.

Counsel for plaintiff offered to prove all the above facts "by the minutes of the board of education and other testimony." The offer was objected to as being incompetent, irrelevant, and immaterial. The objection was sustained, and plaintiff's counsel excepted. We think the ruling correct.

The offer included many different propositions grouped together, and, if the proof of any one proposition was incompetent, irrelevant, or immaterial, the ruling should be sustained. It certainly does not appear to us that the evidence as to one Crawford being principal of the high school in June, 1890, that he continued to teach until June, 1891, and then resigned, that the resignation was accepted, that several candidates were proposed to fill the vacancy, that the salary of the plaintiff was paid by warrants drawn on the treasurer, would have been material or relevant to any issue before the court.

Plaintiff had alleged an express contract made in December, 1894, under and by the terms of which he was to receive one hundred and sixty-five dollars per month for six

months. There was no issue as to the amount of plaintiff's salary. He received one hundred and sixty-five dollars per month for the time he was employed. He claimed employment under an express contract made in December, 1894. A contract made with a different party in June, 1890, would not tend to prove the express contract alleged.

There is evidence in the record as to a special meeting of the board of education of Petaluma on February 16, 1895, for the purpose of investigating certain charges of unprofessional conduct preferred against plaintiff as principal of said high school. It is claimed that the court erred in refusing to strike from the record all evidence as to such special meeting, for the reason that the same was illegal and called without proper notice. We fail to find in the record any motion to strike out such evidence. After the counsel for defendants had examined one Haskell in regard to various matters, including the said special meeting, counsel for plaintiff moved "to strike out the testimony thus far introduced partially upon the ground that it appears that no notice had been given to this member of the board of education."

It does not appear that any motion was made to strike out the evidence as to the special meeting. The motion was broad enough to include all the evidence in the case, including that of plaintiff. The motion was correctly denied.

We find no error in the record and advise that the order by affirmed.

Gray, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. Henshaw, J., Temple, J., McFarland, J.

[Crim. No. 612. In Bank.—January 29, 1900.]

In re BERNARD WARD, on Habeas Corpus.

CRIMINAL LAW—CONVICTION OF EMBEZZLEMENT—PROBABLE CAUSE FOR APPEAL—ILLNESS OF DEFENDANT—HABEAS CORPUS—ADMISSION TO BAIL.—Where probable cause appears for an appeal from a judgment of conviction of embezzlement, the affidavits of reputable physicians, including the affidavit of one physician agreed upon by the district attorney and the defendant, showing that his illhealth is such that confinement in jail pending the appeal would endanger his life, the circumstances are of such an extraordinary character that it is a proper exercise of discretion upon *habeas corpus* to admit the defendant to bail pending the appeal.

HABEAS CORPUS in the Supreme Court for admission of the defendant to bail pending an appeal from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

Frank McGowan, for Petitioner.

THE COURT.—The petitioner was on the second day of December, 1899, convicted of a felony in the superior court of the city and county of San Francisco, to wit, of embezzlement. A judgment was rendered against him that he be imprisoned in the state's prison at San Quentin for the term of seven years. From this judgment he has taken an appeal, and a certificate of probable cause was granted him by the judge of the court in which he was convicted. He made application to said court to be allowed to give bail pending the appeal, and the application was by said court denied. He is now before this court on *habeas corpus* for the purpose of being allowed to give such bail. Upon the hearing he produced the certificates and affidavits of three respectable physicians, in all of which it is stated that he is suffering with chronic catarrh and asthma, and that confinement in jail would be injurious to his health, and in one of which it is stated that "confinement in jail is injurious to his health and endangers his life." At the hearing there was the addi-

tional testimony of Dr. James H. O'Connor, a reputable physician, who testified very fully as to the condition of the petitioner, and stated very positively that, from his frequent examinations of the petitioner, his opinion was that confinement in the jail under the conditions there existing would, if continued two or three months, result fatally. At this hearing, which was on January 13, 1900, it was stated by an attorney who represented the district attorney's office that petitioner and his counsel had refused to allow any physician selected by the district attorney to examine petitioner. As this statement was not denied (the main counsel for the petitioner being absent), it was suggested by the court that the case would be continued to allow an examination of the petitioner by some physician selected by the district attorney. Afterward, a stipulation was entered into by the district attorney and the attorney for petitioner that Dr. J. G. Morrissey was a physician satisfactory to both parties, and that said physician "may make and file his affidavits herein showing the physical condition of Bernard Ward, petitioner herein." Such an examination was afterward made by Dr. Morrissey, and his affidavit has this day been presented to the court, and is as follows:

"I am now, and during all the times hereinafter mentioned was, the city physician in and for the city and county of San Francisco, state of California. I made a physical examination of Bernard Ward, the defendant in the above-entitled matter, at the county jail in the said city and county, on the nineteenth day of January, 1900. I find said defendant to be suffering from asthma and his lungs are involved, and the physical conditions now existing at said county jail, where said Ward is now incarcerated, are such that further confinement of said Ward at said jail is fraught with serious impending danger to his health. The balance of chances is that, if said Ward shall continue to be confined for a period of three months or more in said county jail, a fatal result will ensue."

We think that in this case circumstances of an extraordinary character appear, within the meaning of former decisions of this court, and that it is a proper exercise of discretion to admit petitioner to bail pending the appeal. It is therefore ordered that the petitioner be admitted to bail,

pending his appeal, in the sum of seven thousand dollars, the undertaking to be approved by the judge of the superior court in which he was convicted; and that upon the giving of such an undertaking, approved by said judge, the petitioner be discharged from custody.

[Sac. No. 574. Department One.—January 30, 1900.]

R. D. GIRVIN et al., Appellants, v. J. SIMON, Respondent.

STREET ASSESSMENT—"REMONSTRANCE"—"APPEAL"—The distinction between a "remonstrance" and an "appeal" under the street improvement law is, that the former is made, before assessment, to the action or proceedings of the council, while the latter is made after the assessment, and relates to the acts of the superintendent of streets which are specified as grounds for appeal.

ID.—FORM OF "APPEAL"—USE OF WORD "REMONSTRATE."—A written objection addressed to the city council by the owner of property assessed, and filed with the clerk after the assessment, though not designated as an "appeal," and purporting to "respectfully remonstrate against the acceptance of the contract" described therein, upon the "claim" that "said contract has not been done according to specifications on file in the office of the street superintendent," and stating what work the "claim" includes, is an effective appeal in form and in substance.

ID.—EFFECT OF APPEAL—STAY OF PROCEEDINGS—DUTY OF COUNCIL AS TO NOTICE OF HEARING.—An appeal taken by one assessed owner of property, going to the whole of the work done under the contract, operates to stay proceedings against all assessed owners until the appeal is regularly determined after published notice of hearing, which it is the imperative duty of the council to give, and not of the appellant to ask for.

ID.—POWER OF COUNCIL—RIGHTS OF PROPERTY OWNERS.—The council has no power to dismiss an appeal, or to bind the appellant or other assessed owners of property by deciding without notice or hearing that the appeal is insufficient. The appeal is to be deemed pending, notwithstanding such action; and all assessed owners have a right to be heard thereupon, and can only be concluded by determination thereof after due notice of hearing. The appellant and all other parties assessed may safely rest until due notice is given.

ID.—PREMATURE FORECLOSURE.—An action to foreclose any street assessment pending an appeal by any other property owner assessed upon different property involving the validity of the assessment,

and which, if determined in favor of the appellant, would preclude a recovery against any of the parties assessed, is premature, and cannot be sustained.

APPEAL from a judgment of the Superior Court of San Joaquin County. Edward I. Jones, Judge.

The facts are stated in the opinion.

James A. Louttit, and Louttit & Middlecoff, for Appellants.

Budd & Thompson, and Dudley & Buck, for Respondent.

HAYNES, C.—Action to foreclose an assessment for street improvements in the city of Stockton. The defendant had judgment, and plaintiffs appeal therefrom on the judgment-roll; and their contention is that the conclusions of law are not correctly drawn from the findings of fact.

Among other persons affected by said improvements and assessment was one H. M. Fanning, who was the owner of certain premises which were assessed, but said Fanning had no interest in the lot involved in this case. The court also found "that the defendant, J. Simon, and other holders of property affected by said work and assessment, requested said Fanning to see that an appeal was put in to the city council"; that, within thirty days after the warrant mentioned in the complaint was issued, said Fanning delivered to and filed with the city clerk his written objections to said work, of which, and the indorsements thereon, the following is a copy:

"Stockton, January 10, 1893.

"To the City Council of the City of Stockton.

"Gentlemen: The undersigned hereby respectfully remonstrate against the acceptance of contract for the paving of Channel street between Hunter and California streets, as I claim said contract has not been done according to specifications on file in the office of the street superintendent. My claim includes all curbing, bituminous rock paving, basalt block paving, concrete work, filling under sidewalks and relaying of the same.

"Respectfully yours,

"H. M. FANNING.

"[Indorsed]: Filed January 10, 1893. January 23, 1893, referred back to Mr. Fanning, the city attorney deciding it to be only a remonstrance and not an appeal."

The court further found that no notice has ever been given by the city council of the hearing of said objections, that the city council has not heard the same or passed on the merits thereof, or confirmed said assessment, and that Fanning has not made any further application in the matter.

On these facts two questions arise: 1. Were the said written objections, filed by Fanning, sufficient in form and substance to constitute an appeal from the assessment? 2. If sufficient as an appeal, the city council not having given any notice of a hearing, and not having heard said appeal, is it available as a defense by other property owners whose property is separately sought to be charged for the same improvements, made under the same contract, and embraced in the same assessment?

1. Were the objections filed by Fanning sufficient as an appeal? Appellants refer us to section 3 of the act of 1885 as amended in 1889 (Stats. 1889, p. 158), which provides that, at any time before the issuance of the assessment-roll, owners of lots liable to assessments who may feel aggrieved, or who may have objections to any of the subsequent proceedings of the council in relation to the performance of the work, "shall file with the clerk a petition of remonstrance" specifying in what respect they feel aggrieved; and their argument seems to be that the written objections filed by Fanning, and in which he uses the word "remonstrate" was "a petition and remonstrance" under that section, and not "an appeal" under section 11 of the act of 1885 (Stats. 1885, p. 156), which was then in force, and which provides as follows:

"The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work provided for in this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of

streets, shall, within thirty days after the date of the warrant, appeal to the city council, by briefly stating their objections in writing and filing the same with the clerk of said council. Notice of the time and place of hearing, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations, or proceedings objected to or complained of, shall be published for five days."

The distinction between a remonstrance and an appeal is clear. The former is made to the acts or proceedings of the council, and is made before the assessment; the latter is made after the assessment, and relates to the acts of the superintendent of streets in accepting work not done as required by the contract, or other acts of his specified in the statute.

We think the objections filed by Fanning good as an appeal to the city council, both in form and substance. Though the word "remonstrate" was used, it was not so far inappropriate as to be misleading. Its first definition, as given by Webster, is: "To present and urge reasons in opposition to an act, measure, or any course of proceeding." Besides, the body of the paper distinctly pointed his objections to the acts of the superintendent of streets in accepting work not done according to the specifications of the contract. No one could be misled as to the intention with which the paper was filed. Whilst it is always desirable to use the proper technical or statutory designation of a paper or proceeding, the law will determine its sufficiency from its substance and evident purpose. That Fanning's appeal was sufficient in form and substance see *Barber v. San Francisco*, 42 Cal. 630, and *Belser v. Hoffschneider*, 104 Cal. 455.

2. Did the failure of the city council to entertain the appeal of Mr. Fanning, and to give notice of the hearing of it as required by the statute, operate to stay proceedings against others to collect assessments for the same improvements made under the same contract and included in the same assessment-roll? We think it did so operate.

The objection did not go to some error in the assessment of Mr. Fanning's separate property, and which affected no one else, but the objection went to the whole work. If these objections had been heard and sustained, it is clear that the contractors could not recover against any of the parties assessed. If only the party appealing and the contractor were affected,

it would be quite sufficient to give to each personal notice of the time of hearing; but the statute requires notice of the time and place of hearing, and the subject of appeal, to be published for five days; and the statute specially provides that: "All the decisions of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have remedied and avoided."

The court found that the defendant and other property owners affected by said work requested said Fanning to see that an appeal was made, and if the appeal had been entertained and notice given, each could have been heard, and each would have been concluded by the result, whether they appeared and were heard or not; thus it is clear that the appeal, when filed, though by one only, suspends all proceedings to collect any of the assessments until that appeal has been heard, after the statutory notice has been given, and it is only such hearing upon notice that binds any of the parties assessed. They were not bound by the action of the council in deciding, without notice or a hearing, that the appeal was insufficient.

But it is urged that it was the duty of Fanning to request action by the council. It is not so written. He had done all that was required. The statutory direction to the city council was imperative, and the appellant, and all other parties assessed, might safely rest until due notice was given. In *People v. O'Neil*, 51 Cal. 91, the appeal to the board of supervisors was taken regularly and in proper time. The court said: "The board had no power to dismiss this appeal, and it must be regarded as still pending. It results that the assessment has not become a finality, and the action was prematurely instituted." In *Mahoney v. Braverman*, 54 Cal. 569, cited by appellant, the court pointed out the distinction between that case and *People v. O'Neil*, *supra*, and approved the latter case. The judgment appealed from should be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Van Dyke, J., Garoutte, J., Harrison, J.

[Sac. No. 700.—Department Two.—January 30, 1900.]

In the Matter of the Estate of GEORGE M. KASSON, Deceased. MARY E. MANN, Appellant, v. MARTHA E. McCHESNEY et al., Respondents.

ESTATES OF DECEASED PERSONS—PROCEEDING TO DETERMINE HEIRSHIP—HOSTILE PARTIES—INDEPENDENT ACTORS—CROSS-EXAMINATION OF WITNESSES.—In a proceeding to determine heirship under section 1864 of the Code of Civil Procedure, each person who appears, and either by complaint or answer sets up a distinct claim of heirship, or right to distribution of the estate, peculiar to himself, is an actor, and has a separate and independent right to conduct his case according to his own judgment, including the right to cross-examine the witnesses of hostile parties; and an independent actor styled a defendant cannot be compelled to yield his judgment as to cross-examination of a witness to that of counsel for the plaintiff.

ID.—REPETITION OF CROSS-EXAMINATION—IDENTITY OF QUESTION—DISCRETION OF COURT.—One party cannot be rightfully precluded from cross-examining the witness of a hostile party as to a certain subject matter, upon the ground that a different hostile party had previously examined him as to that matter; but, where there are numerous parties, the court may, in its discretion, prevent frequent and apparently useless repetition of the same identical questions by different parties.

ID.—CROSS-EXAMINATION OF MATERIAL WITNESS—IMPROPER RESTRICTION.—Where a hostile witness has testified to material matters extending over a long period of time, upon whose testimony the court has based its findings against the appellant, a liberal latitude should have been given to the appellant on cross-examination to test the intelligence, accuracy of memory, disposition to tell the truth, bias, relation to the parties, interest, and motives of the witness; and a refusal to allow a reasonable cross-examination of such a witness is ground of reversal.

ID.—IMPROPER IMPEACHMENT OF WITNESS—KEEPING HOUSE OF ILL-FAME. A witness cannot be asked on cross-examination, for purposes of impeachment, whether she did not keep a house of prostitution in a place where she had lived.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion of the court.

Woods & Levinsky, for Appellant.

Budd & Thompson, Nicoll & Orr, and John A. Percy, for
Martha E. McChesney et al., Respondents.

J. A. Louttit, and Louttit & Middlecoff, for William A.
Cowdery, Respondent.

Gould & Bogue, for Philander N. West and P. B. Fraser,
Respondents.

H. R. McNoble, for Rosa B. Hunt, Respondent.

Denson, Oatman & Denson, for George W. Lindy, Re-
spondent.

McFARLAND, J.—The deceased George M. Kasson, died testate at Stockton, California, in September, 1895. By his will he left all of his property to certain persons, most of whom were his nieces and nephews, and who may be designated here for convenience as "Martha E. McChesney and others," and are the respondents in this appeal. The will was admitted to probate during the year 1895, and letters testamentary were issued to Clark McChesney, who was named in the will as an executor, and duly qualified and entered upon the discharge of his duties as such executor. Within the statutory time George W. Lindy filed his petition, and afterward a complaint, under section 1664 of the Code of Civil Procedure, to have the rights of all persons to the estate of Kasson and all interests therein ascertained and declared. He averred in his complaint that he was the legitimate son and the only child and heir of the said George M. Kasson, and that as no provision is made for him in the will, and as it does not appear that the omission to provide for him in the will was intentional, therefore he is entitled to the whole estate. Martha E. McChesney and others filed answers in which they denied that plaintiff was the son of the testator, and claimed that they, as legatees and devisees, were entitled to have the estate distributed to them. Mary E. Mann filed an answer on her own behalf, in which she denied that the plaintiff was the son of the testator, and set up that she was the daughter and only child of said George M. Kasson, and that as no provision was made for her in the

will, and as it did not appear that the omission to provide for her was intentional, therefore she was entitled, as the only heir, to have the entire estate distributed to her. After a hearing, the court rendered judgment in which it was declared and decreed that neither the plaintiff, Lindy, nor the claimant, Mary E. Mann, was a child or heir of the said Kasson, deceased, and that neither of them was entitled to any part of the estate; and that Martha E. McChesney and others were entitled to have the estate distributed to them as legatees and devisees under the will. From this judgment and from an order denying a motion for a new trial the claimant, Mary E. Mann, appeals. No appeal has been taken by the plaintiff, George W. Lindy.

Appellant contends that the evidence was not sufficient to warrant the findings of the court; but as, in our opinion, the judgment and order appealed from must be reversed for errors of law hereinafter noticed, it is not necessary for us to pass upon the sufficiency of the evidence, although it may be said that it was quite contradictory and conflicting.

Appellant contends that the court committed a great many errors in ruling upon the admissibility of evidence, the main points under this head being that the court erred in sustaining objections to questions asked by appellant's counsel in cross-examination of witnesses of the respondents. These points are presented by something over one hundred exceptions. We cannot be expected to notice each, or any considerable number, of these exceptions. We will pass upon them, mainly, as a whole, specifying a few of them for the purpose of showing the general character of the exceptions; and in order to do this it is necessary to notice briefly the nature of the claims made by the different parties, and the general character of the evidence introduced.

The plaintiff, Lindy, claimed that the deceased George M. Kasson, was married to one Mary Hayden in St. Louis, Missouri, on the twenty-eighth day of February, 1845, and introduced a certificate of marriage by a justice of the peace given on that date and certifying that he had married George M. Kasson and Mary Hayden, and claimed that plaintiff was the son and only child of said parties, and was born on the thirtieth day of April, 1847. The appellant, Mary E. Mann,

denies that said certificate of the justice of the peace was of the marriage of the parents of plaintiff Lindy, but claims that it was a certificate of the marriage of her parents, and that she is the daughter and only child of said George M. Kasson and Mary Hayden, and that she was born at said city of St. Louis on the fifteenth day of March, 1849. She claims that her father, the said Kasson, deceased, removed from St. Louis to the state of California in about the year 1850, and that a few years afterward, when she was six or seven years old, she removed with her mother to the state of Arkansas; that she, appellant, went to live with a family named Flint on a ranch near a little town called Loanoke, and lived there about twelve years; that in 1869 the Flints moved to Hot Springs, Arkansas, and she went with them, and that her mother, whom she calls Mary Kasson, was then living at Hot Springs at a hotel called the Earle House, and frequently visited her at the home of the Flints; that about three or four months afterward she, appellant, left Hot Springs; that she returned to Hot Springs in a few months and lived there until about 1872; but that when she returned to Hot Springs her mother had left, and that she had not seen her since and supposed she was dead. The respondents, Martha E. McChesney and others, contend that the claims of the plaintiff and the appellant are both unfounded; that the woman who was married to Kasson in 1845 was not the woman who went to Hot Springs and whom appellant claims to have been her mother; that the woman who actually married Kasson was a Mrs. Mary Hayden, whose maiden name was Mary Ann Mize; that she lived with Kasson until some time in the year 1850, when he went to California, and that he returned to St. Louis and lived with her a while as husband and wife in 1852; that she is not the mother of either plaintiff or appellant, and never had any child by the said Kasson; that she lived in St. Louis until 1876 and then came to California; that she was divorced from Kasson and was afterward married to one Stansbury; that after his death and after coming to California she was married to a man by the name of Molloy; that she is still living and that her present name is Mary Ann Molloy. Respondents claim that they produced this identical woman at the trial; and they did produce a woman

calling herself Mary Ann Molloy who testified, among other things, that she was the woman who was married to Kasson in 1845, in St. Louis, and that the facts as to her life and history alleged in the contention of respondents as above stated are true.

Many of the exceptions upon which the appellant relies were to rulings of the court sustaining objections to questions asked by her of the witness Molloy on cross-examination, we think that many of these rulings were prejudicially erroneous. The testimony of this witness, whether true or not, was certainly in many respects quite remarkable, and presented an instance where a wide range of cross-examination should have been allowed. She testified to material matters occurring during a period of from fifty to sixty years, and a liberal latitude should have been given appellant on cross-examination to test her intelligence, knowledge, accuracy of memory, disposition to tell the truth, bias, relation to the parties, interest, motive, etc. In such a case, a refusal to allow a reasonable cross-examination is a ground of reversal. (*Neal v. Neal*, 58 Cal. 287; *Steinburg v. Meany*, 53 Cal. 425; *Wixon v. Goodcell*, 90 Cal. 622. See, also, *McFadden v. Santa Ana etc. Ry. Co.*, 87 Cal. 464; *People v. Benson*, 52 Cal. 380; *Sharp v. Hoffman*, 79 Cal. 404; *People v. Gallagher*, 100 Cal. 466; *Greenleaf on Evidence*, sec. 446.) The importance of the testimony of this witness is accentuated by the fact that the court expressly found, in accordance with her statements, that she is the woman who intermarried with Kasson at St. Louis on the twenty-eighth day of February, 1845; that she continued to be his wife "until about the year 1862," and that "no child or children were ever born to said George M. Kasson and Mary A. Kasson," and from this finding all the other findings necessarily follow.

In order to understand the pertinency of questions which were not allowed to be asked the witness Molloy on cross-examination by appellant, it is necessary to state briefly some of her testimony in chief and on cross-examination by plaintiff. She testified, among other things, that she was born in Illinois, in December, 1824, and moved to St. Louis in 1843; that she married Hayden, her first husband, when she was about fourteen years old, but could not remember the

month or the year of her marriage to him, and that she heard—but did not know—that he got a divorce from her; that she married Kasson, as before stated, in 1845, and that after he went to California she received many letters from him, and that she thought she got a divorce from him, but did not know the year of the divorce, or how long it was after he went to California, but that it was obtained in St. Louis, and that she never bore either a son or a daughter to Kasson; that in 1863 she was married to Stansbury, who afterward died, although she did not remember the year of his death, but thought it was about two and one-half years after the marriage; that in 1876 she moved to California and lived between Los Angeles and Santa Monica, and afterward in Los Angeles; and that in 1877 she was married in Los Angeles to Charles Pinckney Molloy, and lived with him about two years, when he died. The marriage license and certificate of marriage were introduced, showing that the witness was married to Molloy on January 3, 1877, from which it appeared that she was a native of Kentucky, aged forty years. She testified that this marriage record was correct. She further testified that in 1847 she had a child living with her at St. Louis named Fannie Patterson, who stayed with her until she was about ten years old; that a day or two before she left St. Louis for California she got from an orphan asylum a child two or three days old, whom she wanted for a companion, and brought her to California; that she went by the name of Althea May, and afterward married James Simmons of Los Angeles; that during her whole life she had never been without children, not her own, living with her; that after she went to Los Angeles she wrote a letter to Kasson, addressing it to him at Stockton, and received a reply; that when Kasson returned to California in 1852 he did not want her to go with him, but told her that when two families named West and Dibble, whom she knew, should go to California, he would be glad to have her go with them, but that when these families went she did not go with them. She further testified that in May, 1897, she went from Los Angeles to Oakland, California, and had since lived there in a house on Seventh avenue, and that on July 4, 1897, she was joined there by a man named Wilson and his step-daughter, Miss Milliken, and a niece of the witness, Mrs.

Goldman, all of whom came at that time from the east for the purpose of being witnesses for respondents, and who remained with her in that house until the trial of this cause commenced, which was not until March, 1898, and testified at the trial; and that she left Los Angeles for Oakland a few days after Clark McChesney, one of the respondents, had first visited her at Los Angeles. She also testified that she bore one child to Hayden, which was the only child she ever bore.

The foregoing summary of parts of her testimony is sufficient for an understanding of the exceptions to rulings made on her cross-examination.

It would require too much space to state here all the questions asked of the witness Molloy by appellant to which objections were sustained; it will be sufficient to state enough of them to show the general nature of the rulings made on cross-examination. She was asked, among other questions, the following:

"Q. How long had you known James Hayden before you were married to him?"

"Q. Under what circumstances did you meet Mr. Hayden?"

"Q. How old were you when you married James Hayden?"

"Q. How long did you live with James Hayden as his wife?"

"Q. In what court, and in what city and county and state, and when, did you obtain the decree of divorce, if any, from James Hayden?"

"Q. Did you and the man you say was your husband, Mr. Kasson, ever board in the house of Mrs. Milliken?"

"Q. What year was the last letter written by Mr. Kasson that you received from him while he was in California and you were in St. Louis?"

"Q. Tell me the name of the court and the place where it was located and the time when you obtained the divorce from Mr. Kasson?"

"Q. Is it not true, then, that you were desirous of coming to California and your husband would not allow you to?"

"Q. When did you first ascertain that a letter addressed to him at Stockton would reach him?"

"Q. Do you remember how you signed the letter you say was sent to Mr. Kasson from Los Angeles?"

"Q. State, if you know, whether Mr. Stansbury was in the habit of, or did communicate with your husband George W. Kasson while he was living in California?"

"Q. When and where did you first meet Mr. Charles Molloy?"

"Q. How long had you known Mr. Molloy before you married him?"

"Q. Was he engaged in the same business prior to your marriage that he was at the time of his death?"

"Q. How long had you known Mr. Stansbury before you married him?"

"Q. Do you notice a discrepancy there [referring to the certificate of her marriage with Molloy] of fourteen years in your age?"

"Q. Could you tell me whether it was the early, middle, or latter part of year 1875 when you got this little girl?"

"Q. What means had you, who had never had but one child, and that when you were about sixteen years of age, of giving this little infant nourishment?"

"Q. Was the institution from which you took this child conducted by sisters of mercy or charity, or was it a public institution?"

"Q. Was it an institution of a public or private nature?"

"Q. Was this little girl ever christened while in your charge?"

"Q. Why did she attend the public schools under the name of Molloy and marry under the name of Stansbury?"

"Q. Please describe this girl who you say was not your daughter and who married Mr. Simmons?"

"Q. How old was this girl when she married Mr. Simmons?"

"Q. You say you have always been in the habit of having babies or children with you?"

"Q. What was the cause of habit on your part of having babies or children at your home that did not belong to you?"

"Q. What has become of the various children or babies who have been taken into your home on these various occasions—have they all married or all died—what has become of them?"

"Q. Please state the name of the two children who lived with you at your place between Santa Monica and Los Angeles, and who their parents were."

"Q. When did you first meet Mrs. Peltier in California?"

Witness having testified that Mrs. Peltier had recently written in the memorandum-book of witness the name of the justice who married her to Kasson, was asked: "Why did she write it?"

"Q. Do you know where Mr. Wilson and his stepdaughter, Sara Milliken, and Mrs. Goldman, came from when they arrived at your place in Oakland, for the purpose of being witnesses in this case?"

"Q. Who paid the rent for the house you occupied with these other witnesses in Oakland?"

"Q. How long did you know the people to whom you gave your key to your house in Los Angeles when you came to Oakland?"

"Q. Why did you not deliver the key to Mrs. Simmons, whom you brought from the east with you?"

"Q. Have you made any arrangements for the future as to where you will go to live?"

"Q. Who was the man who came to you in Los Angeles and asked you about your having lived in St. Louis?"

To each of the foregoing questions respondents objected, the court sustained the objection, and appellant took an exception to the ruling; and, as was said in *People v. Benson*, *supra*, "It is difficult to see on what ground this evidence was excluded." Many of the objections were on the general ground that the question was incompetent, irrelevant, not proper cross-examination, etc.; but one of the grounds of objection to quite a number of questions was that "counsel for plaintiff had cross-examined as to that matter," the fact being that after the witness had testified in chief she had to some extent been interrogated by counsel for the plaintiff, Lindy, before the cross-examination by appellant began. Even if, under the law of evidence, appellant had no right to cross-examine as to a matter about which plaintiff had examined the witness, still the rulings would not be justified because the record does not show that to any considerable extent there has been such examination by plaintiff; certainly, the greater part of the questions asked by appellant would not be within such a rule. It is evident, however, that the court erroneously proceeded upon the theory

that there is such a rule of evidence as above indicated. The record shows that after a question had been asked by counsel for appellant, the following occurred:

"Counsel for defendants objected to the question upon the ground that counsel for plaintiff has cross-examined in regard to this matter.

"The Court.—She has been examined as to that.

"Mr. Levinsky.—I beg to differ, not by me.

"The Court.—She has been examined by Mr. Denson, counsel for the plaintiff.

"Mr. Levinsky.—Your honor, please, do I understand that you will not permit me to cross-examine this or other witnesses upon any matter that Mr. Denson, counsel for plaintiff, may have cross-examined upon?"

"The Court.—That is exactly it."

After some argument of the point by the counsel for appellant, the court said: "I will sustain the objection."

It is not true, as a legal proposition, that in a proceeding under section 1664 one party can be rightfully precluded from cross-examining a hostile witness as to a certain matter, upon the ground that another party had previously examined him as to that matter. Under this section each person who appears, and either by complaint or answer sets up a claim of heirship, etc., peculiar to himself, is an actor, and has a separate and independent right to conduct his case according to his own judgment, including the right to ask proper questions of witnesses of hostile parties. After the parties have been brought into court by petition, notice, etc., the one who chooses first to file a complaint is called, for convenience, the "plaintiff," and the others are called "defendants," and their pleadings are called answers; but the requirement as to each pleading is substantially the same, that is, it must set forth "the facts constituting his claim to heirship," etc. The averments of the pleadings show which parties are hostile to each other, and each has a right to cross-examine the witnesses of a hostile party. In the case at bar, the attitude of appellant was adverse to that of all the other parties. She had her own theory of her case, and her counsel could not be compelled to yield his judgment as to cross-examination of a witness to that of

counsel for plaintiff. Of course, in a proceeding under section 1664, when there are numerous parties, a court could, in its discretion, prevent frequent and apparently useless repetition of the same questions by different parties; but the rulings of the court in the case at bar above set forth, as presented by the record, cannot be justified on that ground.

There are many other exceptions relied on by appellant, but many of them may not arise on another trial, and they are too numerous to be separately discussed here. It is necessary to say, however, that it was error to overrule the objection of appellant's counsel to this question asked her when a witness on cross-examination: "Is it not a fact that the house you were keeping in Marysville was a house of prostitution?" (*People v. Crandall*, 125 Cal. 129, 135; *Estate of James*, 124 Cal. 653, 657, and cases cited.) It may be stated, generally, that appellant was too much restricted in her cross-examination of many of respondent's witnesses, and particularly in the cross-examination of respondent's witnesses, Goldman, Clark, McChesney, Robin, and Portier.

The judgment and order appealed from are reversed, and the appellant, Mary E. Mann, is granted a new trial.

Henshaw, J., and Temple, J., concurred.

[L. A. No. 582. Department One.—January 30, 1900.]

MARY T. DRANGA et al., Respondents, v. JANE L. ROWE et al., Defendants. CITY OF SAN DIEGO, Appellant.

QUIETING TITLE TO CITY LOTS—DEFENSE OF CITY—CLAIM OF TAXES—
STATUTE OF LIMITATIONS.—In an action to quiet title to city lots, a defense of the city setting up a claim for taxes assessed and levied more than three years prior to the commencement of the action, and demanding their payment as a condition of plaintiff's recovery, is barred by the statute of limitations.

ID.—INVALID ASSESSMENT AND LEVY OF TAXES—REINCORPORATION OF CITY.—To be valid, the assessment and levy of taxes must be made strictly as provided by law. In a city reincorporated under a lower class, the assessment, equalization, and levy of taxes must be made as provided for cities of such lower class, and, if made for

the year of reincorporation, as differently provided for cities of the class under which the city was originally incorporated, they are invalid and void.

ID.—ACTION TO DETERMINE ADVERSE CLAIM—VOID CLAIM OF DEFENDANT—CONSTRUCTION OF CODE—INAPPLICABLE RULES OF EQUITY.—The rule that equity will require a plaintiff to do equity, by paying such taxes as ought equitably to be paid, as a condition of enjoining a tax sale, and that equity will not cancel a void tax deed, which cannot amount to a cloud upon title, are inapplicable to an action under section 738 of the Code of Civil Procedure to determine an adverse claim, in which action plaintiff is entitled to judgment, if there is a disclaimer, or if the answer shows no legal defense, and the objection that the adverse claim of the defendant is void upon its face is not available.

APPEAL from a judgment of the Superior Court of San Diego County. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

H. E. Doolittle, City Attorney, and T. L. Lewis, Deputy City Attorney, for Appellant.

Withington & Carter, for Respondents.

VAN DYKE, J.—This is an action to quiet title to certain lots in the city of San Diego. The defendants, other than the city, defaulted. In the amended answer of the city it is alleged that on April 18, 1887, the said city was reincorporated as a city of the fourth class, under the provisions of the act of 1883 providing for the incorporation and government of municipal corporations, and that prior to that date had been a city of the fifth class. That between the first day of May, 1887, and the first day of August of said year the assessor of said city made an assessment for the fiscal year 1887 on the property in said city, including the lots in suit, and the same were assessed to one George M. Wetherly, who was then the owner thereof, and was such owner during the whole of said year. That on the 18th of October, 1887, the board of equalization of said city equalized said assessment made by the assessor aforesaid, and that the board of trustees of said city thereupon, on said date, fixed the rate and levied the taxes in said city for municipal purposes for said fiscal year, and that said taxes so levied on the said lots, including improvements, amounted to the sum

of one hundred and sixty-five dollars and ninety-nine cents, which taxes, together with interest and penalties, it is alleged, have not been paid, or any part thereof; and it is asked in said answer that no decree be rendered quieting the title of plaintiffs to said property except on condition that all said city taxes assessed against said property for the year 1887 be paid. Demurrer was interposed to said amended answer on the grounds: 1. That it does not state facts sufficient to constitute a defense to plaintiff's cause of action; and 2. That the defense is barred by the provisions of the Code of Civil Procedure (referring to sections 336, 338-40, 343.)

The court sustained the demurrer, and, said defendant having elected to stand upon said amended answer, the court gave judgment for plaintiffs, from which judgment this appeal is taken.

In *San Diego v. Higgins*, 115 Cal. 170, it is held that an action to recover municipal taxes or enforce the lien thereof is subject to the limitations respecting an action upon a liability created by statute, and is barred in three years after the right of action accrues. It is stated in the respondent's brief, although it does not appear in the record, that the case referred to involved, among other property, that claimed by the plaintiffs in this action, which then belonged to said Higgins; however that may be, it seems clear that under the rule laid down in said case the taxes in question, if valid when levied, could not now be enforced by said city.

The act of 1883, in reference to municipal corporations, requires that as to the fourth class the assessment shall be made between January 1st and April 1st of each year, whereas the answer shows that the assessment was made between May 1 and August 1, 1887. The law also requires, as to cities of the fourth class, that the levy shall be made on the first Monday in May of each year, whereas the answer shows that it was made on October 16, 1887; in other words, it appears that the assessment, equalization, and levy were all made under the law pertaining to cities of the fifth class, instead of cities of the fourth class.

To be valid the assessment and levy must be made strictly as provided by law.

"All proceedings in the nature of assessing property for the purpose of taxation, and in levying and collecting taxes thereof, are *in invitum*, and must be *stricti juris*." (*Weyss v. Crawford*, 85 Cal. 196.)

"A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the taxpayer and state. . . . It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer." (*Perry v. Washburn*, 20 Cal. 318.)

The record in this case shows that the assessment and levy made by the city of San Diego for the year 1887 were not made as directed by law, and hence such assessment and levy are invalid and void.

It is claimed on behalf of appellants that this action is in the nature of a bill in equity, and it is therefore claimed that, although no action will lie to recover the taxes on plaintiff's property for the year 1887, still there is a moral obligation resting upon the plaintiff to pay such taxes, and that upon the maxim that "he who seeks equity must do equity" the plaintiff should pay such taxes before a court of equity will grant relief. The cases cited by appellant are generally in the line of proceedings in equity to restrain the sale of illegal taxes or to cancel a void tax deed.

In such case no relief is necessary, for the reason that the proceedings complained of would not amount to a cloud upon the title.

An action under the code, as this is, is something more than the old proceeding in chancery to remove a cloud or to quiet title, although such action is frequently and perhaps commonly referred to as an action to quiet title. The code declares: "An action may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." (Code Civ. Proc., sec. 738.) The action may be brought by one out of possession as well as in possession, and in the former case the action would be in the nature of an action at law in ejectment; and, hence (by an amendment to the same section), it is provided that a party has "the right

to a jury trial in any case where, by the law, such right is now given."

In such action the plaintiff is entitled to judgment, although the defendant make a disclaimer, but without costs, the same as in case of default. It would be strange indeed if the plaintiff were entitled to judgment on a disclaimer, and not entitled to judgment where the answer shows no legal defense.

In *Kittle v. Bellegarde*, 86 Cal. 564, the court say: "It is contended that the complaint does not warrant any relief, because it shows that the adverse claims of defendants rest upon proceedings which are void upon their face. But this objection is not available in an action to determine an adverse claim, under section 738 of the Code of Civil Procedure. Such an action may be maintained against a person who claims under a void tax deed. (*Harper v. Rowe*, 53 Cal. 234; *Hearst v. Egglestone*, 55 Cal. 365; *Pearson v. Creed*, 78 Cal. 144; *Greenwood v. Adams*, 80 Cal. 74.)"

The judgment is affirmed.

Garoutte, J., and Harrison, J., concurred.

Hearing in Bank denied.

[Crim. No. 506. Department One.—February 1, 1900.]

THE PEOPLE, Respondent, v. OSCAR STERNBERG, Appellant.

CRIMINAL LAW—ROBBERY—SUFFICIENCY OF EVIDENCE—CORROBORATION OF DEFENDANT—PROVINCE OF JURY.—Upon a trial for robbery, where the testimony of the prosecuting witness, if believed by the jury, is sufficient to sustain a conviction, the fact that the testimony of the defendant, in conflict with that of the prosecuting witness, is corroborated by another witness, is not ground for setting aside the verdict. The jury are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds against a less number, or against a presumption or other evidence satisfying to their minds.

1D.—MODIFICATION OF REQUESTED INSTRUCTION—DANGER CONNECTED WITH VERDICT—MATTER OF COMMON KNOWLEDGE.—Where the testi-

mony as to the robbery was direct and not circumstantial, a requested instruction that the jury must consider that innocent persons have been convicted, and consider the danger of convicting an innocent person in weighing the testimony to determine whether there is a reasonable doubt, is not improperly modified by adding that they must also consider that guilty persons have been sometimes acquitted, and consider the danger to society of acquitting a guilty person. The instruction and the modification do not constitute propositions of law, but merely direct the jury to consider matter of common knowledge.

Id.—INSTRUCTIONS AS TO DISTRUST OF FALSE WITNESS—EXPLANATORY REMARKS.—An instruction upon the subject of the distrusting of a witness in other parts of his testimony, who is false in one part thereof, is not made erroneous by explanatory remarks as to what is meant by the rule, where there is nothing in such remarks contrary to law or prejudicial to the defendant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William T. Wallace, Judge.

The facts are stated in the opinion of the court.

Henry U. Brandenstein, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

VAN DYKE, J.—The defendant was informed against by the district attorney of the city and county of San Francisco of the crime of robbery. He was tried, convicted, and sentenced to a term of twenty years in the state prison. He appeals from the final judgment of conviction and from the order denying his motion for a new trial.

1. The first point of contention on the part of the appellant is that the verdict is against law by reason of the insufficiency of the evidence upon which the defendant was convicted. Johnson, the person robbed, testified that on February 21, 1898, he was, with several others, including the defendant, drinking in a saloon in the city and county of San Francisco, called the "City of Gottenburg." That he, Johnson, the defendant, and a party unknown to him, Johnson, left the saloon together and started for the bay shore, and while on the way the defendant threw his arm around the neck of the complaining witness, Johnson, at the same time holding

his hand over his mouth, and with the other hand took from the pockets of the complaining witness twenty-five dollars. Johnson was positive not only as to the robbery, but as to the identity of the person who robbed him, to wit, the defendant. The defendant testified that he did not leave the saloon with Johnson and did not commit the robbery, and he was corroborated on the point of not leaving the saloon with Johnson by a woman employed in the saloon.

The jury are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.

As said in *People v. Vance*, 21 Cal. 400: "We do not interfere with the province of the jury. There must be such overwhelming evidence against the verdict as to justify the inference that it was rendered under the influence of passion, or prejudice, or bias of some kind, to justify any interference on our part with the action of the jury."

In *People v. Williams*, 59 Cal. 674, it is said: "It is a cardinal principle in the administration of criminal law that the province of weighing the evidence belongs exclusively to the jury, and if this court can find, from an inspection of the record, that there was, in the whole evidence of the case, enough to justify the conclusion arrived at by the jury, the judgment of the court below will not be disturbed." This doctrine has been announced so frequently and in so many cases that it is quite unnecessary to review them here.

2. The second contention of the appellant is that the court erred in modifying the fifth instruction requested by the defendant. The fifth instruction, as requested, reads as follows: "You are instructed that you must consider that innocent persons have been convicted, and you must further consider the danger of convicting an innocent person in weighing the testimony to determine whether there is a reasonable doubt of the defendant's guilt." The court gave the instruction as asked, and added: "That is true, gentlemen; but you are also instructed that you must consider that guilty persons have sometimes been acquitted, and you must consider the danger

to society of acquitting a guilty person." The court proceeded further to state that the jury must decide the case upon the testimony, without being deterred from doing their duty according to law. It is, however, the quoted portions of the judge's comment upon the instruction that the appellant takes exception to, stating that it neutralizes or nullifies the effect of the instruction given.

Neither the instruction asked nor the comment of the judge upon giving the same, which is complained of, constitutes a proposition of law. They simply state what is common knowledge, to wit, that, in the history of jurisprudence, it appears that innocent persons have sometimes been convicted, also that guilty persons have more frequently escaped conviction.

In certain cases it might not be amiss to call the attention of the jury to the danger of convicting innocent persons, by way of reminding them to examine and weigh the evidence with more caution, if possible, than in ordinary cases. *People v. Travers*, 88 Cal. 233, was a case of circumstantial evidence, as well as *People v. Cronin*, 34 Cal. 191, referred to in that case. The court say in *People v. Travers*, *supra*: "In the Cronin case the court, in its instruction on this point, after stating the fact that counsel for defendant had, as in the case at bar, alluded to cases where upon circumstantial evidence innocent men had been convicted, told the jury, among other things, that 'the quotation of such cases is proper in order to make the jury careful in arriving at the proper conclusion from such [circumstantial] evidence.' But in the case at bar the court told the jury: 'You are not justified in considering such matters.'"

This case is relied upon by appellant. There the court refused to allow the suggestion in the instruction that innocent men had been convicted, although the case depended upon circumstantial evidence. Here the testimony is direct and is not circumstantial; besides, the court gave the instruction with the qualification and comment already stated. The two cases, therefore, are altogether different.

In the later case of *People v. Ebanks*, 117 Cal. 652, the defendant asked the court to give the following instructions: "The jury are instructed that if there is any one single fact proved to the satisfaction of the jury, by a preponderance of

evidence, which is inconsistent with the guilt of the defendant, it raises a reasonable doubt, and the jury should acquit the defendant."

"You are instructed that it is the settled policy of the law that a person charged with a crime must be acquitted unless the evidence in the case establishes his guilt beyond all reasonable doubt, and it is better that a hundred guilty persons escape punishment than that one who is innocent be punished."

The court refused both said instructions, and on appeal to this court, in its opinion in *Bank*, says: "The meaning of the first of these instructions is involved in doubt, and the final clause of the section instruction is uncalled for"; and the court called attention to the fact that the whole doctrine of reasonable doubt had been fully and properly laid before the jury by the court in its instructions, adding: "The instructions, taken as a whole, are quite as favorable to the defendants as the facts and law will warrant," and affirmed the judgment.

3. It is further contended on the part of appellant that the court erred in modifying the fourth instruction requested by the defendant, which reads as follows: "You are instructed that a witness false in one part of his testimony is to be distrusted in others. If, therefore, the prosecuting witness, John Johnson, is false in any part of his testimony the other parts of his testimony are to be distrusted by you." The transcript does not show that this instruction was modified, but it contains remarks by way of explanation as to what is meant when it is said "that a witness false in one part of his testimony is to be distrusted in others." There is nothing in such remarks contrary to law or prejudicial to the defendant.

The instructions given by the court were quite full, and the court repeated in closing, "Now, you are not to convict the defendant of any offense unless you are satisfied that he is guilty of that offense—satisfied of it to a moral certainty and beyond all reasonable doubt."

The instructions, taken as a whole, are quite as favorable to the defendant as the facts and law warranted.

The judgment and order denying a new trial are affirmed.

Garoutte, J., and Harrison, J., concurred.

Hearing in *Bank* denied.

[S. F. No. 1881. Department One.—February 3, 1900.]

CHARLES N. FOX, Executor, etc., Respondent, v. A. M. SUTTON and ARTHUR W. BURDICK, Respondents. ALICE H. BURDICK and HENRY C. ROSS, Jr., Appellants.

INTERPLEADER—AMENDMENT TO CODE—DEPOSIT IN COURT.—The amendment of 1881, added to section 386 of the Code of Civil Procedure, permits an action of interpleader to be maintained against conflicting claimants of personal property or of the right to the performance of an obligation in whole or in part, and does not require as a condition precedent to the action that the property or money involved shall be deposited in court at the commencement of the action, and an order requiring such deposit may be made pending the action.

ID.—BILL BY EXECUTOR—INTERPLEADER BETWEEN TRUSTEES AND DISTRIBUTEES—INJUNCTION AGAINST DISTRIBUTEES—PARTIES TO DECREE.—In an action by an executor individually and in his official capacity to compel an interpleader between persons claiming a special fund, as trustees thereof, adversely to the estate, and who had brought an action against the executor to recover the fund, and other persons claiming the same fund as distributees of the estate, the plaintiff, upon paying the money into court under its order, is entitled to an injunction to prevent the distributees from enforcing the decree of distribution pending the action for an interpleader between them and the alleged trustees who were not parties to that decree and were not concluded thereby.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting an injunction. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

J. H. McKune, and Henry C. Ross, Jr., for Appellants.

R. S. Gray, for Charles N. Fox, Respondent.

J. H. Craddock, for A. M. Sutton and Arthur W. Burdick, Respondents.

VAN DYKE, J.—On the death of Stephen Powell Burdick there was on deposit in the First National Bank of Oak-

land some five thousand two hundred and eighty-one dollars and sixty-four cents standing in the name of "S. P. Burdick, Atty." This money was claimed by the plaintiff, as executor, as belonging to and being part of the estate of said Stephen Powell Burdick, and was also claimed by the defendants, A. M. Sutton and Arthur W. Burdick, as alleged trustees, by title adverse to said estate. Under these circumstances the bank refused to pay over the money to either the executor or the trustees, unless the claims of such respective parties were first adjudicated. In order to save expense, and in view of the uncertainty of litigation, the claimants agreed by stipulation that the money should be paid over to the executor, subject only to such claim as the said trustees might have to the residue after administration.

Upon this stipulation being entered into, the money was turned over to the executor, and in his final account it is stated that the balance of said money remaining in his hands amounted to sixteen hundred and fifty-seven dollars and ninety cents. Upon the settlement of the executor's final account, Alice H. Burdick, surviving widow of the deceased, petitioned the court for distribution of the one-half of said sum to her, on the ground that the whole of said money so received by the executor was community property, and belonged to the estate of her deceased husband. The defendants, Sutton and Arthur W. Burdick, as said trustees, opposed said petition of distribution, and asked that the money be turned over to them, under the terms of their trust deed. The court denied the petition of the defendants Sutton and Arthur W. Burdick, and also denied their motion for an order staying distribution until they could, by action in a court of competent jurisdiction, have their respective claims to said money adjudicated and determined; and thereupon ordered distribution according to the prayer of the petitioner, Alice H. Burdick.

This court dismissed the appeal of said Sutton and Arthur W. Burdick, as trustees, and of said Burdick in his own right, saying: "They are not named in the will and claim no rights under it and have presented no claim against the estate. They are not, and could not have been aggrieved persons. The order refusing to postpone the decree of final distribution was not appealable." (*In re Burdick*, 112 Cal. 396.)

While said appeal was pending and undetermined, said Sutton and Arthur W. Burdick commenced an action in the superior court in the city and county of San Francisco against plaintiff herein, individually and as executor of said estate, for the recovery of said eight hundred and twenty-eight dollars and ninety-seven cents, which had been so ordered distributed to said Alice H. Burdick. After the dismissal of said appeal, the appellants herein, Alice H. Burdick and Henry C. Ross, Jr., her attorney, applied to the superior court of Alameda county, in which the settlement of the estate was pending, for an order on the plaintiff, Fox, as such executor, to pay over the money which had been ordered to be distributed, or show cause why he should not be punished for contempt in failing to do so.

The plaintiff, Fox, thereupon, as such executor and individually, brought this action. In his complaint the facts, some of which have been referred to, are fully stated, and it is averred in said complaint that the plaintiff has no interest in the said eight hundred and twenty-eight dollars and ninety-seven cents, only as to which of the defendants shall receive the same, and is ready to deliver the same to the person entitled thereto, and prays that said defendants may be required to interplead together for the purpose of determining their respective claims to the said eight hundred and twenty-eight dollars and ninety-seven cents, and upon delivering the same to the party adjudged by the court to be entitled thereto, or upon paying the same under and in obedience to any determination that may be had in the cause, the plaintiff may be discharged from all liability in the premises.

Upon filing his complaint the plaintiff obtained an order to show cause why an injunction *pendente lite* should not issue restraining the defendants, appellants here, from enforcing or attempting to enforce said decree of distribution. The defendants appeared and answered, and, as recited in the injunction order, "thereupon all of the parties being present and represented by counsel in open court, upon the records, files, and matters heretofore submitted to the court, under and in connection with said orders, and upon the records, files, and minutes of said court, at this time, for good cause shown, and no sufficient cause to the contrary being shown, and it ap-

pearing that there has been a trial in this action of the issues of fact raised by the pleadings of all the parties in this action as to the right of the plaintiff to maintain this action, and it satisfactorily appearing to the court from the papers, records, and files in this action presented and considered in connection with and upon the hearing of said orders to show cause that it is a proper case for such injunction, and that sufficient grounds exist therefor," it was ordered that, upon filing a suitable bond, as provided by law, and approved by the court, the defendants, appellants herein, be enjoined from undertaking, in any way whatever, to enforce said decree of distribution, pending this action. From which order this appeal is taken.

The first point made by the appellants is that the plaintiff does not show the right of interpleader, because he did not bring the money into court, or offer to do so at the time of instituting this proceeding. The provision of the code in reference to interpleader, as the section originally stood, provided that a defendant "against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavits that a party to the action makes against him, and, without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct." (Code Civ. Proc., sec. 386.) By way of amendment, in 1881, the following material provision has been added to this section: "And whenever conflicting claims are, or may be, made upon a person for or relating to personal property, or the performance of an obligation, or any part thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another."

This added provision of the code, it appears, authorizes such a proceeding as the one under consideration. And it would seem that this does not require, as a condition precedent to bringing said action, that the party should deposit or pay into the court the money or property in controversy. The record, however, shows that the court, in granting the injunction, ordered that the plaintiff deposit in court and pay to the clerk in that behalf the said amount in controversy.

It is further contended by the appellants that the order of distribution is final and conclusive and estops plaintiff from maintaining this action.

The plaintiff, however, it appears, does not dispute the claim of the appellants, but seeks protection from the demands and claim of the other defendants for the same money, and who are not bound by the decree. Under such circumstances, it would seem but just that the plaintiff, as executor, should not be compelled to defend said action and subject himself, perhaps, to liability, not only to pay said money a second time, but also the costs of litigation. Besides, the plaintiff files his bill, not only as executor, but individually, whereas the decree of distribution runs against him, of course, only as executor.

The other points made by the appellants are not sufficiently important to require special notice or consideration under the facts disclosed by the record. We think the court below justified in granting the injunction as prayed, and the order is affirmed.

Harrison, J., and Garoutte, J., concurred.

[L. A. No. 811. Department One.—February 3, 1900.]

C. E. FERRIS, Appellant, v. BLIEK BAKER et al., Respondents.

MINING PARTNERSHIP.—A mining partnership exists, without an express agreement to form a partnership, when two or more persons owning shares or interests in the mine actually engage in working the same for the purpose of extracting the minerals therefrom.

ID.—ACTION FOR DISSOLUTION, ACCOUNTING, AND SALE—EVIDENCE AS TO MINING PARTNERSHIP—NONSUIT.—In an action for the dissolution of an alleged mining partnership, and for an accounting and sale of the mining property, to repay money contributed by the plaintiff in excess of his proper share in the business of working the mine, where the evidence tends to show the relation of mining partners between the parties, or tends to establish facts indicating that relation which might be reasonably, though not necessarily, inferred from the evidence, it is error to grant a nonsuit.

ID.—REVIEW ON MOTION FOR NONSUIT.—On motion for a nonsuit, whatever facts relevant to the issue the evidence for the plaintiff tended to prove must be regarded as proved, and the plaintiff is entitled to the benefit of the facts in testimony, and of the presumptions of fact which might reasonably be drawn from them.

ID.—DEED OF MINING INTEREST TO WIFE—WORK BY HUSBAND—AGENCY—RATIFICATION—EXISTENCE OF MINING PARTNERSHIP.—Evidence showing that the deed of the mining claim in controversy was procured by a husband to be made in the name of the plaintiff and of his wife, made defendant, that the husband and plaintiff worked the mine together, the husband assuming to represent his wife as agent, that subsequently the husband and wife conveyed an undivided interest to another defendant, agreeing that he should "be at no expense for assessment or development work" on the mine, until it should "begin to produce," and that the wife subsequently declared that she owned the mining property individually, and that her husband was her agent in the matter, tends to show a ratification of the deed to her, and of the acts of her husband as her agent, and to show the existence of a mining partnership between the plaintiff and the wife.

ID.—DECLARATIONS OF HUSBAND AS TO AGENCY.—The declarations of the husband as to his agency for his wife were incompetent to establish the fact of agency as against the wife, though competent for the purpose of showing that the plaintiff dealt with him as agent, and not as principal.

ORDER FOR NONSUIT—JUDGMENT—ENTRY—TIME FOR APPEAL.—An order for a nonsuit entered in the minutes of the court, which does not show what were the grounds of the motion, and does not purport to be a dismissal of the action, nor a judgment of any kind, and upon which no execution could be issued, but is a mere memorandum from which data for a judgment might be drawn, is not a dismissal of the action, nor a judgment of nonsuit, within the meaning of section 581 of the Code of Civil Procedure, declared to be effective when entered in the minutes of the court. The time for appeal does not run in such case until the entry of a proper judgment of nonsuit of the plaintiff, which operates as a final disposition of the case.

APPEAL from a judgment of the Superior Court of Los Angeles County. M. T. Allen, Judge.

The facts are stated in the opinion.

Brown & Newby, for Appellant.

Miller & Brown, for Respondents.

BRITT, C.—Action to obtain the dissolution of an alleged mining partnership, an accounting, a sale of the mining property owned by the alleged partners, and the repayment to plaintiff of money contributed by him in excess of his proper share in the business of working the mine. The court below was of opinion that plaintiff failed at the trial to prove the existence of a mining partnership, and rendered judgment of nonsuit against him.

“A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same.” (Civ. Code, sec. 2511.) “An express agreement to become partners . . . is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine, and working the same for the purpose of extracting the minerals therefrom.” (Civ. Code, sec. 2512.) The property in question here, called the Philadelphia mine or mining claim, was owned by the plaintiff and the defendant Bliet Baker in equal shares, each one-half. Said Bliet is a married woman, the wife of one E. N. Baker. Work on said mining claim, for the purpose of extracting the min-

eral therefrom, was begun in the month of June, 1897, and was continued until December following; the business thus prosecuted comprises the transactions of which plaintiff prays an accounting. The question is whether said Bliak Baker engaged in said business jointly with the plaintiff; if she did, then, under the law expressed in said sections of the Civil Code, the mining partnership existed; otherwise it did not. The evidence produced by plaintiff upon that point was, in substance, as follows: Early in June, 1897, the purchase of said mining claim from the former owner was effected through the instrumentality of said E. N. Baker; as to a one-half interest such purchase was on behalf of the plaintiff, and E. N. Baker caused the deed of the property to be made to plaintiff and said Bliak Baker as grantees—he representing to plaintiff that he was the agent of his wife. Said E. N. Baker and the plaintiff then agreed that they would develop the mine and extract ore therefrom; the work aforesaid proceeded pursuant to this agreement. On July 20, 1897, said E. N. and Bliak Baker jointly executed a written contract with one I. N. Inskeep, whereby they agreed to sell and convey to said Inskeep an undivided one-eighth interest in the said mining claim; this contract contained a clause by which the vendors agreed that Inskeep should “be at no expense for assessment or development work” on the mine up to the time the same should “begin to produce,” and that they would pay all such expenses. A witness for plaintiff testified that he heard a conversation between Mrs. Baker and one Pepper in August, 1897, “relative to the Philadelphia mine”; that Pepper “asked her if Mr. Baker owned the property or if she owned it, and she remarked that the property was hers individually, but Mr. Baker did her business for her, was her agent in the matter.” Defendants admitted that said Pepper, if present in court, would testify to the same effect.

In reviewing the action of the court on the motion for non-suit, we must regard as proved whatever facts, relevant to the issue, the evidence for the plaintiff tended to prove (*Dow v. Gould etc. Min. Co.*, 31 Cal. 629); plaintiff is entitled to the benefit of the facts in testimony “and the presumptions which might reasonably be drawn from them.” (*De Ro v. Cordes*, 4 Cal. 117; *Warner v. Darrow*, 91 Cal. 309.) We

leave out of view any declarations of E. N. Baker as to his agency for his wife; they were incompetent, as the court below rightly held, to establish the fact of agency against her, though competent for the purpose of showing that plaintiff dealt with E. N. Baker as agent and not as principal. But we have seen that there was evidence that Mrs. Baker joined her husband in a contract to sell an interest in the mining claim to Inskeep; by the same instrument she agreed with Inskeep that she would pay all expenses of development work on the mine until it should "begin to produce"; and later she declared, in reference to the mine, that she owned the property, "but her husband was her agent in the matter." From these circumstances it seems to us that a jury, or the court sitting to determine the fact, might reasonably deduce the inferences that Mrs. Baker ratified the acquisition of the mining claim by E. N. Baker as her agent; that the work she promised Inskeep she would pay for was the work then in progress on the mine, rather than work to be done in the indefinite future; and, this work having been authorized by her husband, that she was cognizant of what he had done, and adopted it as done on her behalf. Perhaps none of these are necessary inferences from the facts proved, but, as the evidence tended to justify them, they are to be regarded for present purposes as facts established; as such they tend to show the relation of mining partners between plaintiff and Mrs. Baker. It was error, therefore, to order a nonsuit.

Defendants make the point that the appeal was taken too late and for that reason cannot be considered. The order, such as it was, granting the motion for nonsuit was made and entered in the minutes of the court and noted in the clerk's register of actions on December 6, 1898. Formal judgment of nonsuit against the plaintiff directing that he take nothing and that defendants recover costs, was entered May 3, 1899. The appeal was taken July 21, 1899. It is provided by section 581 of the Code of Civil Procedure, as amended in 1897 (Stats. 1897, p. 98), that the dismissal of an action, or a judgment of nonsuit, for failure by the plaintiff to prove a sufficient case for the jury, "shall be made by order of the court entered upon the minutes thereof, and shall be effective for all purposes when so entered." Section 939 of the Code of Civil Procedure (amended, Stats. 1897, p. 55) provides that

an appeal may be taken from a final judgment within six months after the entry thereof. Defendants urge that the appeal should have been taken within six months after the order allowing the motion for nonsuit was entered in the minutes of the court.

The order in this case was a mere narration by the clerk as follows: "Defendants move the court for nonsuit on the grounds stated. Said motion is argued and thereupon granted." The order did not show what were the grounds of the motion; it did not purport to be a dismissal of the action nor a judgment of any kind, and was, in fact, but a memorandum affording data from which a judgment or proper order might be drafted—similar to the minute made when a decision is announced directing that judgment pass for one party or the other. Obviously, no execution could have issued on such an order when a cause is submitted on evidence for both sides. We are not called upon to say what would have been its effect under said section 581, as regards the time limited for appeal, if it had purported to make final disposition of the action. There was no such disposition, until the entry of the judgment on May 3, 1899, and the appeal was in time. The judgment should be reversed and the cause remanded for a new trial.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1827. Department One.—February 6, 1900.]

JOHN W. RYLAND, Respondent, v. COMMERCIAL AND
SAVINGS BANK OF SAN JOSE, Appellant.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—PAYMENT OF NOTE BY SURETIES—CREATION OF NEW DEBT—STATUTE OF LIMITATIONS.—The payment of the note of a corporation by sureties thereupon creates a new and distinct debt against the corporation and its stockholders, for reimbursement of the sureties; and the statute of limitations only begins to run against the sureties from the date of payment of the debt, and not from the date of the original obligation.

1D.—PAYMENT AFTER THREE YEARS.—The payment of the note by the sureties after the lapse of three years from its date, while the note was not barred by the statute, cannot operate to relieve the stockholders of the corporation from liability to reimburse the sureties, for a payment made within three years before the commencement of the action, notwithstanding at the time of the payment no action could have been brought by the payee of the note against the stockholders.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. S. Kittredge, Judge.

The facts are stated in the opinion.

Jackson Hatch, for Appellant.

S. F. Leib, for Respondent.

CHIPMAN, C.—Action against defendant as a stockholder in the Paul O. Burns Wine Company, a corporation. Defendant pleaded the statute of limitations by demurrer, which being overruled, and defendant declining to answer, judgment passed for the plaintiff, from which this appeal is prosecuted. On August 15, 1894, the wine company was indebted to defendant and others in the sum of \$30,000, to pay which it on that day made to defendant three promissory notes for \$10,000 each, payable respectively September 25, 1894, October 15, 1894, and November 15, 1894, and they were indorsed by plaintiff and his assignors; on July 27, 1895, the wine company borrowed from one Cozzens the sum of \$10,000, payable one year after date, said money being

borrowed to pay the above note for \$10,000 falling due September 25, 1894, and it was so paid by the wine company; plaintiff and his assignors indorsed the note given to Cozzens; the wine company paid these several liabilities in part, and plaintiff and his assignors were compelled to pay the balance, which they did as follows: January 21, 1897, \$3,000 on the Cozzens note; January 25, 1897, \$400 to defendant; January 28, 1897, \$20 to defendant; April 8, 1897, \$1,200 on Cozzens' note; April 8, 1897, \$1,150 to defendants; April 8, 1897, \$50 to defendant; February 21, 1898, \$6,073.75 to defendant on the note due October 15, 1894; February 21, 1898, \$2,234.75 on the Cozzens note. The complaint was filed August 23, 1898.

Appellant's contention is, that the indebtedness of the wine company amounting to \$30,000 on August 15, 1894, was created on that day within the meaning of section 359 of the Code of Civil Procedure, and the statute of limitations commenced to run in favor of appellant as a stockholder on that day, at least as to the \$20,000 represented by the two notes which were then given, maturing respectively October 15, 1894, and November 15, 1894, and that the statute began to run as to the remaining \$10,000 note at least as early as July 27, 1895, when the \$10,000 note was given to Cozzens; that, unless the payment by the sureties can be held to be the creation of an entirely new indebtedness of the wine company to them, and consequently of the wine company's stockholders to them, or in some way stopped the running of the statute, the judgment was erroneous.

Respondent's contention is, that the action is upon an indebtedness created by the fact that a payment was made by a surety of his principal's debt; that this debt is from the principal to the surety, and is not the other debt for which both were bound to the payee of the notes; that it is an entirely new and distinct debt, as would be the debt created had the principal borrowed the money from the surety, or from some one else, and with the money thus borrowed had paid the notes. In respondent's view of the case we concur. Plaintiff's and his assignors' primary liability was to the payee of the notes; by signing the notes they became responsible to the payee for the performance of the obligation of the wine company. (Civ. Code, sec. 2831.) When they, as sureties, paid the obligations of the wine company became bound

to reimburse them (Civ. Code, sec. 2847); and not until the sureties had discharged the obligation of the principal, or some part of it, did any liability from the principal to the sureties arise. The statute of limitations, as against the payee, began to run in favor of the stockholders of the wine company at the date of the notes (*Hunt v. Ward*, 99 Cal. 612; 37 Am. St. Rep. 87); but as there was as yet no liability of the stockholders to the sureties there was nothing, so far as concerned the sureties, for the statute to operate upon. The statute could not be set in motion against the sureties until a liability to them had arisen, and no liability arose until they paid the debt of their principal or some part of it.

The rule is thus stated by Mr. Wood in his work on Limitations, volume 1, page 394: "Where a surety is compelled to pay a debt, the statute begins to run against his claim from the day of such payment, and not from the date of the original obligation" (see, also, 1 Brandt on Suretyship, sec. 230; see, also, cases cited in 24 Am. & Eng. Ency. of Law, 792); and there can be no different rule where the principal is a corporation.

It appears from the complaint that the executors of Peter O. Minor, deceased, one of the sureties, paid \$6,073.75 on the note falling due October 15, 1894, and appellant claims that this payment being made more than three years after the note was due the debt arising from the payment was barred as to the stockholders by section 359 of the Code of Civil Procedure, and, therefore, the judgment should be modified by striking from it the proportionate share of the \$6,073.75 of appellant. The rule above quoted from Wood on Limitations is subject to the exception that the surety must have paid the original debt before the statute had run thereon (1 Wood on Limitations, 398); for the law will not raise a promise on the part of the principal to reimburse the surety where the surety was under no legal obligation to pay. But the surety was under obligation to the payee of the note, jointly and severally with the wine company, for four years after it became due; no liability of the corporation or its stockholders to the surety arose until he paid the note or some part of it, and as, in the present case, he paid within the time during which he was liable to the payee, the case is not within the exception above stated, and the statute as to him

began to run from the date of payment by him. The liability of the corporation to the payee was not barred until after four years elapsed, although the payee could not sue the stockholders on the note after three years. But this is not the liability of the stockholders to the surety. The law implied an agreement on their part to indemnify the surety whenever he paid the obligation, and this implied agreement was distinct from their liability to the payee; the right of action upon the liability arising out of this implied agreement accrued upon payment by the surety and not before, and it must follow that section 359 refers to this liability arising out of the agreement of the stockholders to indemnify the surety, and not out of the original obligation of the corporation to the payee.

The judgment should be affirmed.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 570. Department Two.—February 6, 1900.]

L. H. RODGERS, Respondent, v. J. D. BYERS, Appellant.

STATUTE OF LIMITATIONS—ACTION UPON NEW ACKNOWLEDGMENT OR PROMISE—BAR OF STATUTE—CONDITIONAL PROMISE.—Action must be brought not upon the original obligation, but upon the new acknowledgment or promise, if made after the original obligation is barred by the statute of limitations, and also upon a conditional promise made before such bar has attached, if the action is brought thereafter.

ID.—COMPLAINT UPON CONDITIONAL PROMISE.—Where a conditional promise is relied upon, it must be pleaded as made, and the breach of the condition must be averred and proved, and the recovery had after such showing.

ID.—ACTION UPON NOTE—PLEADING—CONTINUING CONTRACT—ABSOLUTE PROMISE.—A complaint in an action upon a note which alleges absolute written promises made by the defendant before the bar of the statute attached upon the note to pay the amount thereof, and which shows upon its face that the note would otherwise be barred, avers a continuing contract, and the action appears to be properly brought upon the original obligation.

ID.—VARIANCE—PROMISE TO PAY WHEN ABLE.—The action upon the note as a continuing contract cannot be sustained by proof of letters containing a conditional promise to pay the note when able. In such case, the variance is fatal; and the action could only have proceeded upon the promise as made, with an averment in the complaint of condition broken, after defendant's ability to perform.

APPEAL from a judgment of the Superior Court of Lassen County. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

Goodwin & Goodwin, for Appellant.

Spencer & Raker, and H. D. & G. S. Burroughs, for Respondent.

HENSHAW, J.—Plaintiff pleaded that upon the first day of July, 1891, the defendant executed to her a demand promissory note for twelve hundred and fifty-six dollars and sixty-four cents; that there was due, owing, and unpaid upon the note the sum of twelve hundred and fifty-six dollars and sixty-four cents, with interest thereon from the eighteenth day of January, 1895, at the rate of ten per cent per annum. The action was commenced upon October 19, 1896, after the statute of limitations had barred the right of action upon this note the sum of twelve hundred and fifty-six dollars and July, 1893, the defendant made and delivered to her an instrument in writing, signed by him, wherein he acknowledged to her that he was indebted to her in the sum and principal and interest named in the note, and promised her that he would pay her the whole amount of the principal and interest then due and owing, as stated in said promissory note. A like acknowledgment and promise are averred as of the 24th of January, 1894, the second day of August, 1894, and the twenty-fourth day of December, 1895. The prayer of the complaint was for judgment for the principal sum of the promissory note, with interest and costs. Defendant demurred to this complaint for insufficiency of facts, for uncertainty, and upon the further ground that the cause of action was barred by the provisions of section 337 of the Code of Civil Procedure. His demurrer having been overruled, he

answered, specifically denying the alleged acknowledgment and promises, and again pleaded the bar of section 337 of the Code of Civil Procedure.

The court found the acknowledgments and promises to have been made as pleaded, and gave judgment for plaintiff.

It is said in support of the demurrer that it cannot be determined from the complaint whether the action is upon the promissory note or whether it is upon the acknowledgments and promises which it is contended relieved the original contract from the bar of the statute. It seems to be well settled in this state:

1. That when the statute of limitations has barred the remedy upon the original obligation, and an acknowledgment or a promise made after such time is relied upon, the action is not upon the original obligation, but is upon the new acknowledgment, and the implied promise raised by the law, or is upon the new express promise. (*McCormick v. Brown*, 36 Cal. 180; 95 Am. Dec. 170; *Chabot v. Tucker*, 39 Cal. 434; *Biddell v. Brizzolara*, 56 Cal. 374; *Lambert v. Schmalz*, 118 Cal. 33.)

2. If the acknowledgment or the promise be made while the original obligation is legally enforceable, and, if no conditions be attached to the promise, then, though brought after the statute of limitations otherwise would have barred the remedy against the original obligation, the action is still upon the original obligation, which becomes "a continuing contract" under section 360 of the Code of Civil Procedure, because the bar of the statute has been lifted and removed. (*McCormick v. Brown*, *supra*; *Chaffee v. Browne*, 109 Cal. 211; *Southern Pac. Co. v. Prosser*, 122 Cal. 413.)

3. But, upon the other hand, in the case of a new promise, made while the original obligation is legally enforceable, if that promise be not a general promise to pay the obligation according to its tenor and terms, but is a promise coupled with any condition, and an action is brought after the statute of limitations would have barred the remedy upon the original obligation, the action of plaintiff is then upon the substituted, conditional promise, and not upon the original obligation. Such substituted, conditional promise must be pleaded, the breach of it averred, and the recovery had after such showing. (*Curtis v. Sacramento*, 70 Cal. 412.)

It is apparent in this case that the pleader brings his action under the second class of cases above set forth. It is an action upon a promissory note, with averments showing the note to be a continuing contract not barred by the statute of limitations because of the express promise of the payee to pay it according to its terms. The complaint is thus sufficient to pass demurrer. But the evidence as to the promises does not support the allegations of the complaint. The promises are found in certain letters written by defendant to plaintiff. In one he says: "I will liquidate that note as soon as I can get the money." In the second he writes: "I wish it was in my power to send you money at this time, but it is not. Will send you some as soon as I can get it. I hope to get money soon. Will sell cattle at first good offer." In the third is this language: "I have no intention of not paying the note, and will as soon as I can, but can't now." In none of these letters is there an absolute and unconditional promise to pay. The promise in each case is made conditional upon the promisor's financial ability. There is a variance then between the allegation and the proof, and the case as proved comes within the third of the classes above mentioned. In *Curtis v. Sacramento*, *supra*, it is said: "If the debtor simply acknowledged an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration; but if the debtor promises to pay the debt when he is able, or by installments, etc., the creditor can claim nothing more than the promise gives him." This decision is abundantly supported. (*Richardson v. Brecker*, 1 West Coast Rep. 27; 2 Greenleaf on Evidence, sec. 440; Wood on Limitation of Actions, sec. 78; 13 Am. & Eng. Ency. of Law, 754.) Nor can the respondent, under the showing made, be permitted to reject the promise and rely upon an acknowledgment from which the law will imply a promise; for, as is said in *McCormick v. Brown*, *supra*: "When the express promise is shown, the acknowledgment, if there be one, has no effect, for the law will not imply a promise in the presence of an express promise."

Plaintiff's action, as established, then, was an action upon a conditional promise made before the statute of limitations had barred the original obligation, with suit brought after

the bar of the statute. The promise being a conditional promise, plaintiff's action was not upon the original obligation under the theory that the contract was a continuing contract, but should have been as laid down in *Curtis v. Sacramento*, *supra*, an action for the breach of the conditional promise, in which it would have been necessary for the plaintiff to allege the promise and show the condition broken after defendant's ability to perform. It follows that the variance between the allegations and proofs in this case is fatal to plaintiff's recovery, for plaintiff, having declared upon one promise, cannot recover upon proof of another and different promise. (*Curtis v. Sacramento*, *supra*.)

Objection is made by appellant to the ruling of the court in admitting in evidence letters written from defendant to plaintiff containing the promises above mentioned. We do not think it necessary to consider these objections at this time. They go to the sufficiency of the preliminary proofs of mailing and reception, and the objections will doubtless be obviated upon a new trial.

For the foregoing reasons the judgment and order are reversed and the cause remanded.

McFarland, J., and Temple, J., concurred.

Hearing in Bank denied.

[S. F. No. 1972. Department One.—February 7, 1900.]

F. R. BENSON et al., Appellants, v. WILLIAM L. BUNTING et al., Defendants. WILLIAM L. BUNTING, Respondent.

MORTGAGE—SALE UNDER FORECLOSURE—TIME FOR REDEMPTION—CHANGE OF STATUTE.—The change of the statutory time for redemption from six months to twelve months by the amendment of 1897 to section 702 of the Code of Civil Procedure did not affect the time for redemption under foreclosure of a mortgage executed prior to that amendment.

ID.—MISREPRESENTATIONS AS TO TIME FOR REDEMPTION—EMPLOYMENT OF DEFENDANT'S ATTORNEY—REFUSAL OF TENDER—FRAUD—EQUITABLE RELIEF.—Where the plaintiff, in an action to foreclose a mortgage executed prior to 1897, employed the defendant's attorneys to

make the bid at the sale, and misrepresented through them to the defendant that he had twelve months in which to redeem, and defendant, relying on the truth of the representations, neglected to redeem within six months, as he otherwise would have done, and tendered a full redemption within the twelve months, the refusal to accept the tender operated as a fraud upon the defendant, and he is entitled to equitable relief, regardless of whether the misrepresentations were fraudulently or honestly made.

ID.—EQUITABLE ESTOPPEL OF PLAINTIFF.—In such case, the plaintiff is equitably estopped to insist upon the statutory period, on the ground that the defendant was lulled by the plaintiff's assurances into a false security, notwithstanding the assurances were not in writing, and were made without consideration.

ID.—MUTUAL MISTAKE AS TO THE LAW.—A plain and acknowledged mistake of law is not beyond the reach of equity; and where all parties understood the law alike, all making the same mistake, and where the mistake operates to deprive one of the parties of a valuable right, such as that of redemption, and to give to the other party a material advantage not contemplated by either, a court of equity will adjust their rights as though the law relating thereto was in fact as the parties supposed it to be, if necessary to do justice between them.

APPEAL—SERVICE OF NOTICE UPON FICTITIOUS DEFENDANTS—DISMISSAL.

An appeal will not be dismissed for failure of a plaintiff appealing to serve his notice of appeal upon defendants fictitiously named where no service of summons was made upon anyone under the fictitious names, and no appearance was made by any other defendant than the one served with the notice of appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion.

Ben B. Haskell, and William B. Sharp, for Appellants.

Edward C. Harrison, for William L. Bunting, Respondent.

HAYNES, C.—In 1892 Margaret Reese and Mary E. Dever, two of the plaintiffs in the action, executed to one William M. Iburg a mortgage upon the real estate described in the complaint herein, to secure the payment of money. In a proceeding to foreclose said mortgage, a decree for the sale of the mortgaged premises was entered on April 13, 1897, and on June 1, 1897, the mortgaged premises were

sold to defendant Bunting for the sum of nine hundred and fifty dollars, and on February 1, 1898, the commissioner who made the sale conveyed said premises to the purchaser. In January, 1898, the defendants in the foreclosure case offered to redeem said premises from said sale, and tendered to Bunting the full amount required to effect such redemption, which was refused, and this action is prosecuted to obtain a decree permitting them to redeem, notwithstanding the statutory period for redemption had expired before their offer to redeem was made. The other defendants were fictitious persons who were not served, and Bunting will be regarded as the sole defendant.

The complaint contains two counts or causes of action; the first alleging that plaintiffs were induced, through the fraud of the defendant, to believe that they had, under the statute, twelve months within which to redeem the premises sold, and the second count was based upon the alleged mutual mistake of all the parties, all believing and agreeing that the mortgagors had twelve months within which to redeem, when in fact the law gave them but six months. The defendant demurred to each count upon the ground that the facts stated did not constitute a cause of action. The demurrers were sustained and judgment of dismissal entered, and plaintiffs appeal.

In 1892, when the mortgage was executed, the statute provided that redemption might be made at any time "within six months after the sale." (Code Civ. Proc., sec. 702.) This section was amended February 26, 1897, by extending the time for redemption to "twelve months," the amendment to take immediate effect; and in the second count it was alleged, in substance, that all the parties understood and agreed that said amendment which was passed took effect before the decree was entered in the foreclosure case, controlled, and that under it the time for redemption was extended to twelve months. It is conceded by plaintiffs that the statutory time within which redemption must be effected is fixed by the statute in force at the time the mortgage was executed, and not by one subsequently enacted, and that, under the statute, they should have redeemed within six months from the date of the sale.

It is alleged in the first cause of action that at the time of the sale, and repeatedly thereafter, until the last of January, 1898, the defendant represented to the plaintiffs that they had a full year in which to redeem; that prior to the sale the plaintiffs employed certain attorneys, who continued in their employment until the 29th of March, 1898; that on June 1, 1897 (the day of the foreclosure sale), Bunting employed the same attorneys, ostensibly to act for him in bidding for said property at said sale, but in reality to deceive the plaintiffs and lead them to believe that they had a full year in which to redeem said property, and that they, as well as defendant Bunting, then, and repeatedly afterward, until January 31, 1898, knowing that plaintiffs reposed full confidence in them, and intending to cheat and defraud the plaintiffs in the interest and for the benefit of defendant Bunting, informed them that they had a full year in which to redeem, that these representations were false, and were so made in a manner not warranted by the information of the defendant or of his attorneys, and were so made with intent to deceive the plaintiffs.

Respondent insists that this mode of alleging actual fraud applies only to cases of contract, as specified in section 1572 of the Civil Code, and also insists that the allegations of fraud are not sufficiently specific; that the alleged misrepresentation was of a matter of law and not of fact, and after all was a mere matter of opinion, that there was no confidential or fiduciary relation between the plaintiff and defendant, and that plaintiff had no right to rely upon his representations.

I think, however, that the allegations touching defendant's employment of plaintiffs' attorneys, and the allegations touching their intention in making the alleged representations, are sufficient as tested by general demurrer; but if it be conceded that the representations made by the defendant and by the attorneys, who it would seem from the allegations were acting for both parties, were honestly made, and without any intention to deceive or mislead, enough is alleged to entitle plaintiffs to relief; that if upon the trial the court should find that these representations were honestly made, and without any intention to mislead or deceive the plaintiffs, and that, relying upon the correctness of the representations so made, they failed to redeem within six

months, as they would otherwise have done, and within the twelve months, which they were assured they had under the law, they offered to redeem and tendered the redemption money due at the date of the tender, they would be entitled to relief. It is alleged that if they had not been informed and believed that they had a year in which to redeem their property, they would have redeemed it in the six months; that the property was of the value of five thousand dollars, and was sold to defendant for nine hundred and fifty dollars. If, therefore, it be conceded that the representations touching the time for redemption were made with an honest, though erroneous, belief that they were true, no injustice would be done the defendant in permitting the plaintiffs now to redeem. Upon that supposition the defendant made his bid upon the basis of a twelve month period for redemption, and he should have accepted their offer to redeem made within that time, and his refusal to do so operated as a fraud upon them, and entitled them to relief in equity.

Upon this subject the supreme court of the United States said: "Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that, before the time had expired to redeem the property, the plaintiff was told by defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances, the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration. upon the ground that the debtor was lulled into a false security. (*Guinn v. Locke*, 1 Head, 110; *Combs v. Little*, 4 N. J. Eq. 310; 40 Am. Dec. 207; *Griffin v. Coffey*, 9 B. Mon. 452; 50 Am. Dec. 519; *Martin v. Martin*, 16 B. Mon. 8; *Butt v. Butt*, 91 Ind. 305; *Turner v. King*, 2 Ired. Eq. 132; 38 Am. Dec. 679; *Lucas v. Nichols*, 66 Ill. 41; *McMakin v. Schenck*, 98 Ind. 264.) In *Southard v. Pope*, 9 B. Mon. 261, 264, it is said that 'a refusal by the purchaser to accept the money and permit the redemption to be made within the time agreed would be a fraud upon the defend-

ant in execution, and authorize an application by him to a court of equity for relief.' " (*Schroder v. Young*, 161 U. S. 334, 344.)

2. As to the second count, we think it clearly sufficient to justify a judgment permitting the plaintiff to redeem. Section 1578 of the Civil Code defines a mistake of law to be: "1. A misapprehension of the law by all parties, all supposing they knew and understood it, and all making substantially the same mistake as to the law."

The mistake, as to which statute governed the right of redemption in that particular case, was one which might be readily made. The redemptioners might well rely upon the statements of the defendant and of counsel, and have adopted their views as to the time given by law for redemption. The mistake was one which related to rights which the redemptioners had in the property sold under the decree of foreclosure, and was solely in regard to the time within which an undisputed and well-understood legal right might be exercised. All understood the law alike, all making the same mistake; and where, as in this case, the mistake operates to deprive one of the parties of a valuable right, and to give the other a material advantage not contemplated by either, a court of equity will adjust their property rights as though the law relating thereto was, in fact, as the parties supposed it to be, if that becomes necessary to do justice between them. In *Hunt v. Rousmanier*, 8 Wheat. 174, 215, Chief Justice Marshall said: "Although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity."

In view of our conclusions hereinbefore stated, it is not necessary to consider the question of inadequacy of the price paid for the property by the defendant, further than to say that the inadequacy here alleged, conceding that it was not so gross as to constitute a ground for vacating the sale where the statute gives a right of redemption, is a proper allegation in a bill in equity to redeem, as it shows that the equity involved is valuable and important.

Respondent contends that the appeal should be dismissed

upon the ground that the two fictitious defendants named in the complaint should have been served with the notice of appeal. It is sufficient to say that no service of process was made upon them, or upon any person intended to be represented by these names, nor was there any appearance by them, or by any person other than defendant Bunting. These fictitious persons could not be affected by any judgment this court or the court below might render.

I advise that the judgment appealed from be reversed, with directions to the court below to overrule the demurrer to each cause of action.

Chipman, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed, with directions to the court below to overrule the demurrer to each cause of action.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1328. Department One.—February 7, 1900.]

ABBIE B. REED, as Executrix, etc., Respondent, v. S. R. JOHNSON, Appellant.

APPEAL FROM JUDGMENT—REVIEW, WHEN LIMITED TO JUDGMENT-ROLL.—

Upon appeal from a judgment taken more than sixty days after the rendition thereof, the case must be reviewed upon the judgment-roll alone, without reference to the question whether the evidence was sufficient to support the findings and judgment or not.

ESTATES OF DECEASED PERSONS—ACTION UPON NOTE BY EXECUTOR—

COUNTERCLAIM—SHARE OF DECEDENT'S INDEBTEDNESS TO CORPORATION.—In an action upon a note of the defendant to the decedent brought by the administrator, the defendant cannot offset, by way of counterclaim, his alleged share in an indebtedness of the decedent to a corporation formed by them as partners, for which alleged indebtedness no claim was presented against the estate.

ID.—PLEADING OF COUNTERCLAIM—BURDEN OF PROOF—APPEAL FROM JUDGMENT—FAILURE TO FIND UPON ISSUE—PRESUMPTION.—The alleged matter of counterclaim was deemed controverted by the

plaintiff, and the burden of proof was upon the defendant to establish it; and upon an appeal from the judgment, where the evidence cannot be reviewed, it must be presumed, in favor of the judgment and against error therein, that a failure to find upon the issue as to the counterclaim was not prejudicial to the appellant, and that a finding thereon, if made, would be adverse to the appellant.

APPEAL from a judgment of the Superior Court of Santa Clara County. W. G. Lorigan, Judge.

The facts are stated in the opinion of the court.

J. H. Campbell, for Appellant.

The counterclaim alleges that the estate of the decedent is insolvent, and this is a reason for sustaining the setoff. (2 Story's Equity Jurisprudence, sec. 1437a; Waterman on Setoff, sec. 395 et seq.; 22 Am. & Eng. Ency. of Law, notes 218; *Naglee v. Palmer*, 7 Cal. 543; *Russell v. Conway*, 11 Cal. 93; *Howard v. Shores*, 20 Cal. 278; *Hobbs v. Duff*, 23 Cal. 596; *Doane v. Walker*, 101 Ill. 628; *Hall v. Kimball*, 77 Ill. 161; *Littlefield v. Albany Co. Bank*, 97 N. Y. 581; *Clark v. Sullivan*, 13 L. R. Ann. 233, note, and cases cited.) The failure to find upon the allegations of the counterclaim is ground of reversal. (*Traverso v. Tate*, 82 Cal. 170; *Bosquett v. Crane*, 51 Cal. 505; *Roeding v. Perasso*, 62 Cal. 515; *Taylor v. Reynolds*, 53 Cal. 686; *Baggs v. Smith*, 53 Cal. 88.)

Charles Wesley Reed, and Archer & Archer, for Respondent.

The counterclaim cannot be maintained for want of allegation of presentation of claim against the estate. (Code Civ. Proc., sec. 1500; *Quinn v. Smith*, 49 Cal. 165; *Bank of Stockton v. Howland*, 42 Cal. 132; *Hentsch v. Porter*, 10 Cal. 555, 562.) The counterclaim does not allege the appointment of an executrix. (*Judah v. Fredericks*, 57 Cal. 389; *Preston v. Knapp*, 85 Cal. 565.) The counterclaim exists in favor of the corporation, and not in favor of a party to the record. The defendant cannot sue thereon. (*Duff v. Hobbs*, 19 Cal. 660; *Lyon v. Petty*, 65 Cal. 325; *Howard v. Shores*, 20 Cal. 278, 282; *Chase v. Evoy*, 58 Cal. 354.) The claim of the corporation was unsettled. No unsettled and indefinite claim in favor of a corporation or partnership can be allowed

as a counter-claim. (*Wood v. Brush*, 72 Cal. 224; *Fisher v. Sweet*, 67 Cal. 228.) The creditors and other stockholders have an interest in the assets of the corporation (Thompson on Corporations, sec. 1569), and the joint interest of the defendant therein with them is not the subject of setoff in an action at law upon his individual note. It is well settled that joint and separate debts cannot be set off against each other at law. (*King v. Wise*, 43 Cal. 635; *Hook v. White*, 36 Cal. 299; *Howard v. Shores*, *supra*.)

VAN DYKE, J.—The judgment in this case was entered April 20, 1897. Subsequently, defendant moved for a new trial on a bill of exceptions, which was denied. Thereupon the defendant appealed from the judgment and from said order denying a new trial, January 4, 1898. The appeal from the order was dismissed April 4, 1898, and a rehearing denied April 30, 1898.

The appeal from the judgment having been taken more than sixty days after the rendition thereof, it must be considered and determined upon the judgment-roll alone, without reference to the question whether the evidence was sufficient to support the findings and the judgment or not. (Code Civ. Proc., sec. 930, subd. 1.)

The action is founded upon a promissory note made by the defendant to C. W. Reed, deceased, dated October 6, 1894, for the sum of \$3,661.89. The complaint admits certain payments having been made on said note and demands judgment for the balance claimed to be due in the sum of \$1,884.89, together with interest and costs. The answer by way of counterclaim avers that said Reed and the defendant were partners in business, and that on or about the first day of January, 1894, they organized, under the laws of this state, a corporation known and designated as the C. W. Reed Company. That C. W. Reed, at divers times, between August, 1894, and the 1st of March, 1896, obtained and appropriated to his own use money of the C. W. Reed Company, aggregating \$7,889.85, and that at the death of Reed, March 19, 1896, he was indebted to the said company in the sum of \$5,755.50, and to the defendant in the sum of \$2,877.75. That the said Reed and the defendant were equal partners in

the former partnership firm and also in the C. W. Reed Company. And it is asked that the amount alleged to be due the C. W. Reed Company and the defendant from the late C. W. Reed "be allowed as a counterclaim herein, and that this defendant have judgment for the balance in his favor."

There is no averment in the counterclaim that either the alleged demand due the C. W. Reed Company or the defendant was ever presented for allowance to the executrix of the estate of said Reed, deceased.

The court found in accordance with the allegations of the complaint, and judgment was ordered and entered for the sum of \$2,081.29, the balance due on the note in question. And "further finds that the answer of defendant constitutes no defense or counterclaim in this action."

The main contention on the part of the appellant is that the court failed to find on the issues raised by the affirmative matter contained in the answer.

The statement of new matter constituting the alleged counterclaim, on the trial, was deemed controverted by plaintiff (Code Civ. Proc., sec. 462), and the burden was therefore upon the defendant to prove such affirmative matter.

The appellant is not prejudiced unless the court has failed to make such findings in his behalf as would countervail the other findings in favor of the plaintiff; and, as error in the court below is not to be presumed, but must be shown by the appellant, if the omitted findings must have been adverse to the appellant, their omission is not error sufficient to authorize reversal. (*Hutchings v. Castle*, 48 Cal. 156; *Himmelman v. Henry*, 84 Cal. 104; *Winslow v. Gohransen*, 88 Cal. 450; *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95.)

The point under consideration, therefore, must be determined adversely to the appellant. If, however, findings had been made in accordance with the allegations of the counterclaim, they would not have had any legal effect upon the right of the plaintiff to the judgment sought by her.

The judgment is affirmed.

Garoutte, J., and Harrison, J., concurred.

[Crim. No. 589. In Bank.—February 7, 1900.]

THE PEOPLE, Respondent, v. DAVID QUINN, Appellant.

CRIMINAL LAW—INDICTMENT—INDORSEMENT OF NAMES OF WITNESSES—

OBJECT OF REQUIREMENT.—The purpose of the requirement of the law that the names of the witnesses examined by the grand jury shall be indorsed upon the indictment, is to inform both the people and the defendant of the names of the witnesses upon whose testimony the indictment is based, and to give them both an opportunity to secure their attendance at the trial.

ID.—USE OF SURNAME OF WITNESS—KNOWLEDGE OF DEFENDANT—HARMLESS IRREGULARITY.—An irregularity in indorsing the mere surname of a witness upon the indictment, without giving his Christian name, is harmless, if the defendant, immediately after the finding of the indictment, knew the particular person so named upon the indictment.

ID.—REQUESTED INSTRUCTIONS INCLUDED IN CHARGE.—When all matters material and legally sound in instructions requested by the defendant were given by the court in its charge to the jury, it is not error to refuse such instructions.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. Joseph W. Hughes, Judge.

The facts are stated in the opinion of the court.

J. Charles Jones, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr.,

Deputy Attorney General, for Respondent.

THE COURT.—Defendant appeals from a judgment of manslaughter and also from an order denying his motion for a new trial. He insists that the names of the witnesses examined by the grand jury were not indorsed upon the indictment, the statute containing such a requirement. This contention rests upon the fact that the name of a certain witness before the grand jury, to wit, G. W. Ogden, is indorsed upon the indorsement as — Ogden. The purpose of the aforesaid requirement of the law is to inform both the people and the defendant of the names of the witnesses upon whose testimony the indictment is based, and thereby to give them both an opportunity to secure these witnesses at the trial.

(*People v. Northey*, 77 Cal. 629.) In the case at bar there was a noncompliance with the statute, but the irregularity was harmless, as the defendant almost immediately after the finding of the indictment knew the particular person who was named as Ogden upon the indictment. (*People v. Crowey*, 56 Cal. 36.)

It is next claimed that the court committed error in refusing certain instructions offered by defendant. In this regard it is sufficient to say that all matters material and legally sound in the rejected instructions were given by the court in its charge to the jury.

For the foregoing reasons the judgment and order are affirmed.

[S. F. No. 2119. Department One.—February 8, 1900.]

In the Matter of the Estate of A. H. GRIFFITH, Deceased.

J. COMPONICO, Appellant, v. H. M. GRIFFITH, Administrator et al., Respondents.

ESTATES OF DECEASED PERSONS—SALE OF REAL ESTATE—COMPETITIVE BIDS UPON HEARING OF RETURN—DISCRETION OF COURT.—At the hearing of a return of sale of real estate of a deceased person, under section 1552 of the Code of Civil Procedure, the court is not bound either to accept the offer of a first bidder at an increase of ten per cent upon the price bid at the sale, or to order a new sale; but the court has discretion to receive at such hearing as many competitive bids as may be offered, and, upon a consideration of all the bids, may then determine whether to accept the highest bid or to order a new sale.

ID.—POSTPONEMENT OF HEARING AFTER ADVANCE BID—JURISDICTION.—

After the making of an advance bid, the court has jurisdiction to postpone a further hearing upon the matter until another day, and has the same jurisdiction to receive additional bids at the postponed hearing which it had at the original hearing.

ID.—CONFIRMATION OF SALE TO PURCHASER AT INCREASED BID.—Where, at the hearing of the return of sale, an advance bid of ten per cent was made, and, at a postponed hearing, the purchaser offered a still higher bid, and the advance bidder then declined to make any further bid, a confirmation of the sale to the purchaser at the highest bid is within the discretion of the court.

APPEAL from an order of the Superior Court of Contra Costa County confirming a sale of real estate of a deceased person. Joseph P. Jones, Judge.

The facts are stated in the opinion of the court.

A. D. Splivalo, for Appellant.

John O'B. Wyatt, for Respondents.

THE COURT.—At the hearing of the return of sale of certain real estate made by the administrator under an order of the court, the appellant made an offer for the property of ten per cent more in amount than that named in the return, whereupon the court continued the further hearing of the matter for one week. At that time the appellant asked the court that the sale be confirmed to him, but the respondent Sarah A. Wilson, who was the original purchaser at the administrator's sale, offered to pay for the property a sum in excess of that bid by the appellant, and, the appellant declining to make any further bid, the court accepted the bid of Mrs. Wilson and confirmed the sale to her. The present appeal is from this order, and it is contended by the appellant that when he made the bid of ten per cent advance, the court, under section 1552 of the Code of Civil Procedure, had no option except to confirm the sale to him, or to order a new sale.

After the appellant had made his offer it was within the jurisdiction of the court to postpone a further hearing upon the matter until another day, and at the hearing so postponed it had the same jurisdiction to receive additional bids as it had at the original hearing. The provision in section 1552, giving the court a discretion to accept the offer of an advanced bid, or to order a new sale, does not limit its exercise of that discretion to the alternative of accepting the first offer that may be made or ordering a new sale, but it is authorized to receive as many bids as may be made, and, upon a consideration of all the bids, may then determine whether to accept the highest, or to order a new sale. The object of the provision in the above section is that the court may secure as high a price for the property as possible, and, if it can accomplish this result without subjecting the estate to the expense and delay attendant upon a new sale, it would seem

to be in the exercise of a wise discretion to permit a competitive bidding for the property at the hearing upon the return.

The order is affirmed.

Hearing in Bank denied.

[Crim. No. 452. In Bank.—February 8, 1900.]

THE PEOPLE, Plaintiff, v. JOSEPH S. COLE, Appellant.

CRIMINAL LAW—HOMICIDE—CONFESSED ERROR IN INSTRUCTIONS—UN-AUTHENTICATED REQUESTS OF DEFENDANT.—Where the attorney general has confessed manifest error in the instructions given to the jury upon the trial of a defendant accused of murder, the effect of the error cannot be overcome by filing certified copies of requests for instructions by the defendant, suggested to contain similar error, where the alleged requests are not authenticated as such in any manner that would entitle them to be considered as part of the record.

ID.—TRANSCRIPT UPON APPEAL—IMPROPER DUPLICATION OF INSTRUCTIONS.—Where the instructions are properly authenticated so as to be part of the judgment-roll, they ought not to be duplicated by insertion in a bill of exceptions. There should be only one insertion in the record of instructions properly authenticated.

ID.—CONVICTION FOR MURDER—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.—Where there are circumstances in evidence indicative of the guilt of the defendant, and others of an opposite tendency, and the opinions of the medical witnesses were conflicting, the question of the guilt or innocence of the defendant is for the jury to determine.

ID.—MOTION TO SET ASIDE INFORMATION—COMPLAINT BY DISTRICT ATTORNEY—CURE OF DEFECT.—A motion will not lie to set aside the information for murder after the defendant has been held to answer as the result of a preliminary examination, on the ground that the district attorney who filed the complaint had no personal knowledge of the facts of the homicide. Any imperfections in the complaint are cured, where the evidence taken by the magistrate warrants an order holding the defendant to answer.

ID.—MOTION IN ARREST OF JUDGMENT.—A motion in arrest of judgment can only be made for defects appearing upon the face of the indictment or information.

Id.—IMPROPER CROSS-EXAMINATION BY DISTRICT ATTORNEY.—The cross-examination of a witness for the defendant who had made previous statements to the district attorney in conflict with the testimony given, must be confined to the question of such conflict on material points; and it is error for the court to permit the district attorney to read portions of the statement made to him, having no relation to the testimony given, and to cross-examine the witness thereon, to the prejudice of the defendant.

APPEAL from a judgment of the Superior Court of Monterey County and from an order denying a new trial. N. A. Dorn, Judge.

The facts are stated in the opinion of the court.

B. V. Sargent, for Appellant.

W. F. Fitzgerald, Attorney General, W. H. Anderson, Assistant Attorney General, and Tirey L. Ford, Attorney General, for Plaintiff.

BEATTY, C. J.—Defendant was convicted of murder in the second degree, and appeals from the judgment and from an order denying his motion for a new trial. The assignments of error upon the rulings of the trial court are very numerous, and the attorney general confesses that several of them are well founded. In view of this confession of error we deem it unnecessary to enter upon a particular discussion of many of the points presented in the brief. and argument on the part of the appellant. We will, however, advert briefly to some matters involved in the further proceedings to be taken in the case.

The attorney general, among other things, admits that the trial judge, in his charge to the jury, misstated the law applicable to the case in several particulars. In consequence of this admission, the district attorney of the county where the conviction was had asked leave to amend the record here by filing certified copies of certain instructions alleged to have been given at the request of the defendant, and which, it is suggested, contain the same propositions which are complained of in the charge of the court. We do not find that this suggestion is borne out by a comparison of the two sets of instructions, but if it were we could not take notice of the fact, for the reason that these alleged requests to charge are not authenticated in any manner that would entitle them to

be treated as a part of the record. They are not included in any bill of exceptions. Not one of them bears the signature of the trial judge, and they do not purport to have been requested by anyone. The provisions of the Penal Code, sections 1127, 1176, 1207, and the numerous decisions of this court construing them, and the corresponding sections of the old criminal practice act, point out very plainly the mode of authenticating the charge of the court and the requests to charge with the rulings thereon, so as to make them a part of the record. These directions of the statute should be observed, for otherwise the charge of the court, and the requests to charge whether allowed or refused, can only become a part of the record by being incorporated in a bill of exceptions. In this case the alleged requests to charge are not authenticated in either of the methods prescribed by the statute.

The condition of this record gives occasion to advert to a fault of practice, by no means uncommon, which is productive of unnecessary expense and inconvenience. It very frequently happens that the entire charge of the court—both that which the court has given of its own motion and the requests to charge—are inserted in the record twice, once as a part of the judgment-roll under section 1207 of the Penal Code, and again as a part of the defendant's bill of exceptions. We would suggest that if the charges are properly authenticated, as they should be, and thus become a part of the judgment-roll, there is no more propriety in setting them out again at large in the bill of exceptions than there would be in putting the indictment or information, minutes of the plea and of the trial, and judgment in the bill of exceptions. When anything is properly in the record once, it is worse than useless to repeat it in a bill of exceptions, for the only result is to cumber the transcript with useless matter, making it more inconvenient to examine, and imposing an unnecessary expense upon the counties for printing. In this case the charge of the court, which is very lengthy, is printed in the transcript no less than three times—once as a part of the judgment-roll, where for lack of authentication it was not entitled to be placed, and twice in the bill of exceptions, where one insertion would seem to have been sufficient.

Returning from this digression to the matters urged by the

appellant as grounds for reversal of the judgment, it will be sufficient for the purposes of this opinion to make a very general statement of the facts of the case. The defendant was accused of the murder of his wife's sister. The deceased was an epileptic, and subject to very violent attacks, followed by several hours of stupor or insensibility, and was peculiarly liable to such attacks when under the influence of alcohol, a condition in which she was not infrequently found. About 10 o'clock in the evening, after drinking more or less whisky, she and the defendant, who was also partially intoxicated, entered a buggy and drove to a saloon where they obtained another bottle of whisky, with which they departed. At 3 o'clock next morning the defendant drove up to his house with the dead body of the deceased by his side, her head being against his breast and partly covered by a buggy robe. Her clothes were torn and disarranged, and there were evidences that she had been in a struggle on the ground. To his wife and others who were then present the defendant at that time offered no particular explanation of what had occurred, merely insisting that the woman was drunk and not dead. Subsequently, he stated that, after procuring the whisky at the saloon, his sister in law had proposed a moonlight drive; that she held the reins and was driving along a country road when she suddenly fell out of the buggy. He got out and attempted to lift her back into her seat, but she struggled and resisted, and he was unable to do so. Becoming exhausted he fell asleep. When he woke up he made another effort, succeeded in getting the woman back in the buggy, and, the night being cold, drew the buggy robe over her. The theory of the defense was that deceased fell from the buggy in an epileptic fit brought on by intoxication, and that she died in consequence of the fit, or was, perhaps, suffocated by the buggy robe while in the condition of stupor following the convulsion. The theory of the prosecution seems to have been that she was strangled by defendant while making a felonious assault upon her. An autopsy revealed appearances which, according to some of the medical testimony, indicated strangulation. Other experts testified, in effect, that there was nothing in such appearances inconsistent with the theory that she died from the effects of the epileptic fit, or from slow suffo-

cation by the buggy robe. Aside from the medical testimony there were several circumstances, some of which may have had a tendency to sustain the theory of the prosecution, while others were of an opposite tendency. Many witnesses testified to the good reputation of the defendant for peace and quiet, honesty, and integrity.

Such being the case, we cannot sustain the contention of the defendant that the evidence was wholly insufficient in law to support the verdict. The case was one proper to be submitted to the jury, and, if the rulings of the court in other respects had been free from error, the judgment would have to be affirmed.

Neither did the court err in overruling the motions of defendant to set aside the information and in arrest of judgment.

The ground upon which these motions were based was the alleged fact that the district attorney, upon whose sworn complaint the defendant was arrested and examined before the committing magistrate, had no personal knowledge of the facts of the homicide.

The case of *Ex parte Dimmig*, 74 Cal. 164, is cited by appellant in support of his assignments of error respecting this matter. The decision in that case has no application to a motion to set aside an information or in arrest of judgment. When a charge of this kind has been examined by a magistrate, and the evidence taken at the examination warrants an order holding the defendant to answer, the imperfections of the complaint, if any, are cured, and the commitment is legal. As to the motion in arrest of judgment, that can be based only upon defects appearing upon the face of the indictment or information. (Pen. Code, secs. 1012, 1185.)

But the court did commit an error gravely prejudicial to the rights of defendant in permitting the district attorney to pursue the course of cross-examination he adopted with respect to the wife of the defendant. It seems that a few days after the death of her sister the wife of defendant visited the office of the district attorney and made a long statement, partly hearsay, about the circumstances surrounding her sister's death and her own troubles and differences with defendant. At the trial she was a witness for the defendant, and some of her testimony was at variance with portions of her

previous statements to the district attorney. It was entirely proper, of course, in laying a foundation for impeachment to question her as to those parts of her previous statement which were in conflict with material portions of her testimony at the trial. But the court permitted the district attorney to read portions of her statement and question her as to their correctness, which had no relation to her testimony at the trial, and several of which contained matters wholly immaterial and irrelevant and only calculated to prejudice the jury against the defendant. It is not necessary to go into a detailed statement of the particulars in which this cross-examination exceeded proper limits. For the guidance of the court in case of a new trial it is sufficient to say that, if the wife of defendant is again a witness in his behalf, her previous statements can be laid before the jury only so far as they are in conflict with her testimony on material points.

The errors in the charge of the court being confessed, it is unnecessary to specify or review them, as they are not likely to be repeated on a new trial.

The judgment and order appealed from are reversed and cause remanded.

Temple, J., McFarland, J., Van Dyke, J., and Henshaw, J., concurred.

[S. F. No. 1478. In Bank.—February 8, 1900.]

ALFRED CLARKE, Appellant, v. POLICE LIFE AND
HEALTH INSURANCE BOARD, Respondent.

POLICE PENSION FUND—AMENDED STATUTE NOT RETROACTIVE.—The act of March 2, 1897 (Stats. 1897, p. 52), including therein the amendment of section 3 of the act of 1889 (Stats. 1889, p. 56), relating to the pension fund payable to retiring police officers, is not retroactive; and the amended section has no application to one whose connection with the police department was at an end before the passage of the amendment.

ID.—MANDAMUS—ALLEGED DISCRIMINATION OF BOARD.—Upon an application for a mandamus to the police relief, life, and health insurance board to compel the payment of a pension to which the applicant is not entitled, the alleged discrimination of the board in award-

ing pensions under the amended act to other retiring police officers no less deserving than the applicant is immaterial, and cannot affect the applicant's right.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Troutt, Judge.

The facts are stated in the opinion of the court.

Alfred Clarke, Appellant *in pro. per.*

Harry T. Creswell, City and County Attorney, for Respondent.

BEATTY, C. J.—The appellant filed his petition in the superior court for a writ of *mandamus* to the police life and health insurance board, compelling that body to grant him a pension out of the fund arising under the provisions of the act of March 4, 1889, entitled, "An act to create a police relief, health, and life insurance and pension fund," etc. (Stats. 1889, p. 56.) A general demurrer to his petition was sustained, and judgment passed in favor of the board. This is an appeal from the judgment, and the sole question to be determined is whether, on the facts stated in the petition, the appellant is by the terms of the law, as amended March 2, 1897 (Stats. 1897, p. 52), entitled to a pension.

The petitioner was appointed and commenced his service on the police force of the city and county of San Francisco December 3, 1856. He continued to serve until September 1, 1868, when he was removed without cause. On the 1st of February, 1869, he was reappointed and served continuously from that date until December 31, 1887, when the condition of his health compelled him to resign.

Up to the date of appellant's resignation from the force the only law providing for the allowance of any pecuniary benefits to policemen in addition to their salaries was the act of April 1, 1878. (Stats. 1878, p. 879.) Under the provision of that act the legal representative of a policeman dying in the service was to be paid the sum of one thousand dollars, and to any policeman resigning on account of bad health or physical infirmity was to be paid the amount he had contributed to the "life and health insurance fund," that is to say, he was to be paid two dollars a month for the time he

had been in service, that being the sum paid into the special fund from the general county funds under the act of 1878, on account of every policeman on the rolls. As the petitioner resigned on account of ill-health in 1887, while the act of 1878 was in force, it is to be presumed that he received the two dollars per month to which he was entitled, and that his claims upon the fund ended with his retirement from the force.

More than a year after his resignation the act of 1889 was passed, by which a new system was established, and the act of 1878 repealed. (*Pennie v. Reis*, 80 Cal. 266; *Pennie v. Reis*, 132 U. S. 470; *Clarke v. Reis*, 87 Cal. 543.) By this act it was provided that pensions should be paid to policemen retired after twenty years' service. The petitioner makes no claim under this law as originally enacted. He seems to concede that he was not within its terms, because, and only because, his service had not been continuous for twenty years, though the aggregate of his two terms of service was thirty years.

By the act of March 2, 1897, however, section 3 of the act of 1889 was amended so as to be read as follows: "Whenever any person, at the taking effect of this act or thereafter, shall have been duly appointed or selected, and sworn, and have served for twenty years, or more, in the aggregate, as a member in any capacity or any rank whatever, of the regularly constituted police department of any such county, city and county, city or town, which may hereafter be subject to the provisions of this act, said board may, if it see fit, order and direct that such person, after becoming sixty years of age, be retired from further service in such police department, and from the date of the making of such order the service of such person in such police department shall cease, and such person so retired shall thereafter, during his lifetime, be paid from such fund a yearly pension equal to one-half of the amount of salary attached to the rank which he may have held in said police department for the period of one year next preceeding the date of such retirement."

Under this amendment, providing for pensions to those whose service in the police department should extend in the aggregate to twenty years, petitioner claims his pension. We think it clear, from a reading of the amended section, that it

has no application to one whose connection with the department was at an end before the passage of the amending act. It simply provides that in case of an officer, who is a member of the force, who is sixty years of age, and who has served twenty years in the aggregate, the board may, in its discretion, retire him on half pay, or retain him in active service at full pay. It does not apply to a person over whom the board has no power or authority whatever.

The main portion of appellant's argument is directed to the alleged discrimination of the board in awarding pensions to others who, as he contends, are less deserving than himself, and no more clearly within the letter of the statute. It would make no difference, so far as this proceeding is concerned, whether this charge is true or not. The only question we are concerned with is whether, under the law, it is the duty of the board to allow a pension to the petitioner, and, since we have concluded that such is not their duty, it would not alter the result if it appeared that they had awarded pensions to others not entitled to receive them. In saying this we are not to be understood as intimating that the other pensions alluded to have been improperly allowed. Those questions are not before us for decision, and between all those cases and the present case there exists the important difference that the pensioners were in service at the date of their respective retirements and subsequent to the amendment of the act.

The judgment of the superior court is affirmed.

McFarland, J., Van Dyke, J., Henshaw, J., Garoutte, J., Harrison, J., and Temple, J., concurred.

[S. F. No. 1309. Department One.—February 10, 1900.]

HENRY SUNKLER, Appellant, v. GEORGE S. MCKENZIE, Respondent.

INSOLVENCY—ORDER RELATING TO CROP UPON HOMESTEAD—APPEAL—RES ADJUDICATA—ACTION FOR VALUE OF CROP—ASSIGNEE SUED INDIVIDUALLY.—An order denying the right of an insolvent debtor to the proceeds of a grape crop grown upon land claimed by him as a homestead, and affirming the right of the assignee thereto, is appealable; and, upon failure to appeal therefrom within the time limited, it becomes *res adjudicata*, and is a bar to an action brought by the claimant of the land to recover the value of the crop against the assignee in his individual capacity.

ID.—IDENTITY OF ACTION AND PARTIES.—The final determination of a substantial matter of right upon a motion or petition upon which the interested parties have a right to be heard, is *res adjudicata*, where the same subject matter is sought to be litigated in an independent action; and the substantial identity of the two proceedings cannot be affected or destroyed by the fact that an assignee in insolvency was a party to the motion or petition for a fund held by the assignee in his official capacity, and is sued in the action, in his individual capacity, in relation to the same subject matter.

APPEAL from a judgment of the Superior Court of Napa County and from an order denying a new trial. E. D. Ham, Judge.

The facts are stated in the opinion of the court.

W. H. Barrows, for Appellant.

C. J. Beerstecher, for Respondent.

CHIPMAN, C.—Action to recover the value of a certain crop of grapes grown upon land claimed by plaintiff to be a homestead. On June 19, 1895, plaintiff recorded his declaration of homestead upon certain farm land in Napa county; June 28th he was adjudged insolvent upon his own petition; August 19th he petitioned to have a homestead set apart to him in the insolvency proceedings; on September 23d the petition was heard and the court found that the premises were of greater value than five thousand dollars,

and that Sunkler was entitled to have a homestead set apart to him of value no greater than five thousand dollars; and three appraisers were appointed to appraise and admeasure the premises; that they made report November 26th, setting apart certain two hundred acres, including the dwelling, valued by them at five thousand dollars, but "the crop had been removed and did not enter as a factor in such valuation"; and on December 30th the court entered its decree confirming said report, "awarding and setting apart to said insolvent, as a homestead, the land and premises thus admeasured"; that on June 28th aforesaid "a crop of grapes had just formed and commenced to grow on the grape vines then growing on said homestead property"; that they thereafter grew and matured about September 28th; that on September 13th, and "while said proceedings were pending to set aside the homestead above recited, and order was made by the . . . court, in the matter of said . . . insolvency," directing the assignee therein (defendant in this action) to sell all the grapes growing on said land, pursuant to which he sold the crop, realizing six hundred dollars for the grapes grown on the portion of the land awarded Sunkler as a homestead. The court made the following finding:

"That on the eleventh day of January, 1896, plaintiff, said insolvent, filed in said court and matter his petition praying that said assignee be directed to pay over to petitioner said sum of six hundred dollars, in which petition the plaintiff submitted to the court all the matters and things in his complaint herein set out, and sought an adjudication of the rights and all thereof in this action asserted by him. An answer was filed therein by the assignee objecting to the making of such an order, and said matter was duly set for hearing, the respective counsel appearing therein, whereupon testimony, oral and documentary, was offered by the respective parties and the merits of said cause were fully argued and considered, and the cause submitted on briefs to be filed. Thereafter, and on March 7, 1896, the court made and rendered its decision therein, finding upon all the issues framed by such petition and answer thereto, and adjudging that petitioner was not entitled to recover said sum or any part thereof. Judgment was thereupon entered accordingly, and thereafter and on the fifteenth day of April, 1896, written notice of such

decision was duly served by defendant's attorney on the attorney for plaintiff, and no exception to or appeal from said decision or judgment was ever taken, nor has the same been sought to be modified or set aside, but still stands as made and entered in said matter."

After the insolvent had failed to recover upon his petition in the insolvency proceeding he commenced this independent action in which judgment went against him, and hence this appeal from the order denying his motion for a new trial and from the judgment.

Section 64 of the Insolvency Act of 1895 provides that: "It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart, for the use and benefit of said insolvent, such real and personal property as is exempt from execution," and the section provides that there shall be notice of the hearing on the application. Section 71 of the act provides that an appeal may be taken to the supreme court: "5. From an order against or in favor of setting apart homestead or other property claimed as exempt from execution." Appellant claims that the judgment entered denying his petition of January 11, 1896, and adjudging that the funds in the assignee's hands belonged to the creditors of the insolvent, was merely an interlocutory order made upon motion, and that he was not precluded thereby from bringing a separate action to recover the property. Mr. Freeman says: "The tendency of the recent adjudications is to inquire whether an issue or question has been in fact presented for decision and necessarily decided, and, if so, to treat it as *res judicata*, though the decision is the determination of a motion or summary proceeding, and not an independent action. This is especially true when the decision did not involve a mere question of the proper form or time of proceeding, but was the determination of a substantial matter of right, upon which the parties interested had a right to be heard upon issues of law or fact or both, and these issues, or some of them, were necessarily decided by the court as the basis of the order which it finally entered granting or denying the relief sought." (Freeman on Judgments, sec. 326, and cases cited.)

Appellant concedes that the court had the power to give or

withhold the relief sought at its pleasure, but he contends that the order was not final nor appealable, and therefore was not a bar to this action. Some of the cases place importance upon the fact that the order is appealable where it is pleaded in bar. If the statute did not make the order in the present case one from which an appeal may be taken, a different question might arise, upon which we express no opinion. But we think the order here was appealable. The relief asked by the insolvent in his petition rested on the claim that the property was exempt from execution; it could have no other foundation, and the court must have so regarded the issues, for it found that the money was not exempt. The subject matter of the petition was identical with that in controversy here; the parties were the same and in the same right, and the petition was presented to a court of competent jurisdiction. The fact that defendant here was not sued in his capacity as assignee can make no difference. He held the money in that capacity and defended in that capacity, and the identity of the two actions cannot be destroyed by making him a defendant in the present action in his individual capacity. The identities demanded by the law to make the matter *res judicata* were fully supplied. (Freeman on Judgments, sec. 252.) It is familiar law, as well as manifest justice, that a man should not be vexed twice with the same litigation. This rule is not without its exceptions. But when, as here, a question has once been fully litigated and every opportunity given to either party to present his case and to have any supposed errors in the lower court corrected by review in the highest court, it would be an abuse of the rights of a litigant to compel him to enter upon a second trial of the same question. In this case the insolvent presented a formal petition in writing, in the proceeding which he himself had instituted; the assignee answered; the cause was tried upon evidence submitted, documentary and oral; the case was argued upon briefs and submitted for decision; the court made full findings and entered judgment thereon, and no steps were taken to renew the motion to set aside or vacate the judgment or appeal therefrom. This judgment, in our opinion, became an adjudication of the matter in controversy and final as to the facts then litigated. (See the subject discussed and the cases cited in *Commissioners etc. v. McIntosh*, 30 Kan. 234.)

It becomes immaterial whether the court erred in finding that plaintiff did not reside upon the premises when he filed his declaration of homestead, and it is also immaterial by what right he claimed the proceeds of the grapes as property exempt from execution. Whatever was the basis of his right, the right itself was litigated and the judgment is a bar to the present action.

The judgment and order should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Garoutte, J., Harrison, J., Van Dyke, J.

Hearing in Bank denied.

[L. A. No. 752. In Bank.—February 14, 1900.]

J. L. DE JARNATT, Respondent, v. PASCUAL MARQUEZ, Appellant.

PROMISSORY NOTE—ATTORNEYS' FEES—SPECIAL DAMAGE.—Attorneys' fees, provided for in a promissory note in the event of suit, are in the nature of special damage under the contract.

ID.—ACTION IN JUSTICE'S COURT—JURISDICTION—VOID JUDGMENT.—A justice's court has no jurisdiction of an action upon such a promissory note, where the amount of the principal sum and the attorneys' fees demanded under the contract exceed the sum of three hundred dollars; and the judgment rendered in such action is void.

ID.—JUDGMENT IN SUPERIOR COURT—APPEAL TO SUPREME COURT.—Where the superior court, upon appeal from the void justice's judgment, tried the case, and rendered a judgment exceeding three hundred dollars, exclusive of interest, the supreme court has jurisdiction of an appeal from that judgment, even though it be void; and such an appeal cannot be dismissed for want of jurisdiction.

ID.—DISMISSAL OF APPEAL—SUFFICIENCY OF UNDERTAKING—FAILURE OF SURETIES TO JUSTIFY—ATTORNEY AS SURETY.—The appeal to the supreme court from such judgment of the superior court cannot be dismissed upon the ground that the sureties upon the three hundred dollar undertaking upon appeal failed to justify, nor upon the ground that one of the attorneys of appellant became a surety

upon the undertaking, in violation of a rule of the superior court.

ID.—VIOLATION OF RULE OF SUPERIOR COURT COGNIZABLE THEREIN.—

The violation of a rule of the superior court that an attorney for the appellant shall not become a surety upon the undertaking on appeal is a matter cognizable before that court, to be dealt with as it may be advised.

MOTION in the Supreme Court to dismiss an appeal from the Superior Court of Los Angeles County. Lucien Shaw, Judge.

R. Dunnigan, and H. L. Dunnigan, for Appellant.

Hugh J. & William Crawford, for Respondent.

HENSHAW, J.—This is an application to dismiss defendant's appeal. Plaintiff commenced an action in the justice's court to recover upon a promissory note made by defendant in the sum of two hundred and fifty dollars. The instrument provided for the payment of attorney's fees in the event of suit. In his complaint in the justice's court plaintiff alleged that the sum of one hundred dollars was a reasonable attorney's fee. He asked judgment for the face of the note, with interest, and attorney's fee in the sum of one hundred dollars. Defendant joined issue in the justice's court, and, after trial, appealed to the superior court from the judgment given against him. The appeal was upon questions both of law and fact. After trial *de novo* in the superior court, judgment was again given for plaintiff for the amount of the note with interest, and for attorneys' fees fixed in the sum of one hundred dollars. From the judgment of the superior court defendant took the appeal to this court which is here sought to be dismissed.

Attorneys' fees under a contract such as this are in the nature of special damage. (*Prescott v. Grady*, 91 Cal. 519; *Clemens v. Luce*, 101 Cal. 432.) Plaintiff's demand, therefore, in his action in the justice's court was for two hundred and fifty dollars, the principal sum of the promissory note, and the one hundred dollars pleaded by way of special damage as a reasonable attorney's fee. The justice's court was therefore without jurisdiction and its judgment void. (Code Civ. Proc., sec. 112, subd. 1.) Whether or not, upon a showing of these facts, the superior court should have declared the

judgment of the justice's court void, still as it tried the case and rendered a judgment against defendant for over three hundred dollars, he has the right of appeal to this court from that judgment, even though it be void.

The fact that the sureties did not justify upon the three hundred dollar appeal bond is not a ground for dismissal of the appeal. (*Hill v. Finnigan*, 54 Cal. 311; *Tompkins v. Montgomery*, 116 Cal. 120.) Nor is the further fact that one of the attorneys of appellant became a surety upon the undertaking on appeal in violation of a rule of the superior court a ground of dismissal. It is a matter cognizable before that court, to be dealt with as it shall be advised.

The motion to dismiss is denied.

McFarland, J., Temple, J., Van Dyke, J., Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1225. Department One.—February 15, 1900.]

LAURA L. HAWLEY, Respondent, v. GRAY BROTHERS
ARTIFICIAL STONE PAVING COMPANY, Defendant.
H. N. GRAY and A. E. BUCKMAN, Appellants.

APPEAL—BOND TO STAY EXECUTION—JUDGMENT AGAINST SURETIES—
PROCEDURE IN ORIGINAL ACTION.—The entry of judgment against the sureties upon a bond to stay execution pending an appeal is not a special proceeding within the meaning of section 23 of the Code of Civil Procedure, but is part of the procedure in the original action authorized by section 942 of the Code of Civil Procedure, and is in sequence of the judgment rendered therein against the appellant.

ID.—STIPULATION OF SURETIES—PARTIES TO ACTION.—Under the provisions of the code, the sureties upon the appeal bond stipulate that upon the affirmance of the judgment appealed from, if the appellant does not pay the same within thirty days after the filing of the remittitur, judgment may be entered against them for the amount of said judgment, with the interest then due thereon; and they thereby make themselves parties to the original action, and the proceedings against them are taken therein.

ID.—PREMATURE JUDGMENT—EFFECT OF REVERSAL.—The reversal of a premature judgment entered against the sureties less than thirty

days after the filing of the *remittitur* affirming the judgment leaves the parties in the same position held by them before it was rendered. It does not affect or impair the obligation of the sureties upon their undertaking, which is the same as if no judgment had been rendered against them; and the plaintiff is still entitled to enforce that obligation by a proper motion for judgment against them.

ID.—PRESUMPTION—REQUEST OF APPELLANTS FOR VACATION OF JUDGMENT.—Upon appeal from a judgment properly entered against the sureties, it will be presumed, if necessary, that the former premature judgment reversed upon appeal was vacated at the request of the appellants.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Fisher Ames, for Appellants.

Olney & Olney, for Respondent.

HARRISON, J.—The respondent recovered a money judgment against the Gray Brothers Artificial Stone Paving Company, from which the defendant therein appealed to the supreme court, and the appellants herein, as sureties for said appellant, executed an undertaking on appeal sufficient in form and amount to stay the enforcement of the judgment. The judgment appealed from was affirmed, and a *remittitur* from this court was filed in the superior court June 7, 1897. Upon the same day, that court, upon motion of the plaintiff, entered judgment against the sureties upon their undertaking. From this judgment the sureties appealed, and, upon the confession of the respondent therein that the judgment appealed from was prematurely entered, this court reversed the judgment and remanded the cause. Thereafter the superior court, upon the motion of the plaintiff, ordered judgment to be entered against the appellants herein—the sureties on the original appeal—and from the judgment thus entered they have appealed.

The entry of judgment against the sureties upon an appeal bond is not a special proceeding within the definition of section 23 of the Code of Civil Procedure, but is a part of the procedure in the original action authorized by section 942 of the Code of Civil Procedure, and is in sequence of the judgment rendered therein against appellant. Under the pro-

vision of this section the sureties stipulate that upon the affirmance of the judgment appealed from, if the appellant does not pay the same "within thirty days after the filing of the *remittitur*," judgment may be entered against them for the amount of said judgment, with the interest that may then be due thereon. They thus make themselves parties to the original action and the proceedings against them are all taken in that action.

By the terms of their undertaking the appellants herein did not become liable to the plaintiff until the expiration of thirty days after the *remittitur* upon the affirmance of the judgment had been filed in the superior court. That court was not authorized, therefore, to render judgment against them upon the same day that the *remittitur* was filed, and the judgment thus entered was properly reversed. The reversal of that judgment had the effect to annul the action of the superior court and to leave the parties in the same position that they held before it was rendered. Such reversal did not affect the obligation of the sureties upon their undertaking, but their liability thereon was the same as if no judgment had been rendered against them. The plaintiff was still entitled to enforce this liability, and the court was authorized to render judgment therefor against them.

The judgment appealed from is regular in form, and upon its face purports to have been rendered upon the liability incurred by the appellants upon their undertaking in the former appeal. Instead of being impaired by the rendition of the former judgment, it would, if necessary, be presumed that the former judgment was vacated at the request of the appellants. (*Paige v. Roeding*, 96 Cal. 388; *Von Schmidt v. Von Schmidt*, 104 Cal. 547.)

The judgment is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1212. Department One.—February 15, 1900.]

H. C. DUKES, Appellant, v. MARY EMMA KELLOGG et al., Respondents.

PARTNERSHIP—ACTION AT LAW BY PARTNER—PLEADING—ACCOUNTING AND SETTLEMENT.—A partner cannot sue his copartners in an action at law, unless an accounting and settlement of the partnership accounts is alleged in the complaint.

ID.—ACTION FOR AGREED SALARY—INSUFFICIENT COMPLAINT.—A complaint in an action by a partner against his copartners to recover the amount of an agreed salary, payable out of moneys received by the partnership in the prosecution of its business, which merely alleges an unpaid balance of salary, and that the other copartners collected moneys largely in excess thereof, but which does not allege an accounting and settlement of the partnership, nor sue therefor, does not state a cause of action.

ID.—TRUSTEESHIP FOR PLAINTIFF—INDEBTEDNESS OF PARTNERSHIP—RIGHTS OF CREDITORS.—It not appearing in the complaint what was the condition of the indebtedness of the partnership, it cannot be claimed that the copartners were trustees for the plaintiff of a specific fund. Outside creditors of the partnership are entitled, upon an accounting, to be paid in preference to the plaintiff; and an accounting is necessary to settle the claims of the creditors of the partnership, and the rights of the individual partners as between themselves.

ID.—AMENDMENT OF COMPLAINT—REPEATED OPPORTUNITIES—DISCRETION OF COURT.—The allowance of amended pleadings is largely in the discretion of the court; and where the plaintiff had been allowed three opportunities to amend his complaint, and had failed to make it sufficient, and a further proposed amended complaint was not tendered by him to the court for its inspection, it is not an abuse of the discretion of the court, nor erroneous, to refuse to permit any further amendment.

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

Wells Whitmore, for Appellant.

Naphtaly, Freidenrich & Ackerman, Joseph C. Meyerstein, and L. E. Phillips, for Respondents.

GAROUTTE, J.—The question presented by this appeal

arises upon the sufficiency of the complaint. Plaintiff alleges, among other matters, that he and defendants Babcock and Calvin W. Kellogg (now deceased) formed a partnership under the firm name of the "Oakland Institute" for the treatment and cure of the alcohol, opium, morphine, and tobacco habits; that it was agreed that the plaintiff should hold the position of medical director of the partnership at a monthly salary of one hundred and fifty dollars, payable from the moneys received from patients and patrons of the partnership; that under this agreement there became due plaintiff two thousand four hundred dollars; that a sum greatly in excess of the aforesaid amount was paid by the patrons and patients to the partnership; that said Babcock and Kellogg "received and retained and used said moneys, and ever since have unlawfully and wrongfully detained the same from plaintiff, and ever since have refused and neglected to pay to plaintiff the amount due him under the terms of said agreement." A special and general demurrer was sustained to this complaint. We pass to an inspection of the pleadings in view of that demurrer.

No accounting and settlement of the partnership accounts is alleged, and under such circumstances one partner may not sue his copartners in an action at law. (*Ross v. Cornell*, 45 Cal. 133.) Under the allegations of the complaint, we see nothing here but a plain, simple, ordinary partnership between these three parties. It does not appear from the pleading but that there were many outstanding debts against the partnership. Indeed, the partnership may have been totally insolvent. Outside creditors are entitled to be paid before plaintiff, and an accounting is the only procedure by which an adjudication upon all these matters may be procured. The facts, stated broadly, are that Babcock and Kellogg, converted to their own use certain moneys of the partnership, and that these moneys, or their equivalent, plaintiff seeks to recover from his partners to be applied upon his salary. But perchance plaintiff at all these times was indebted to the partnership. Perchance defendants at all these times were large creditors of the partnership. These things all go to show that only by an accounting may these matters be apportioned and adjudicated upon. In view of what has been said, and in view of the facts as we have stated them, we see nothing

in the claim that defendants were trustees of a specific fund, which condition had the effect of eliminating all question of partnership from the case.

The power of the court in allowing parties to an action to file amended pleadings is largely a matter of discretion. Here plaintiff had three opportunities to make a good complaint and failed. Three failures to make a good complaint fairly indicate that a fourth attempt would also be unavailing. The proposed amendment, or proposed amended pleading, was not tendered to the court for inspection, and we see nothing erroneous in the action of the court in refusing to allow further amendments. The failure to make a good pleading probably arises in a lack of facts rather than in the fault of the pleader.

For the foregoing reasons the judgment is affirmed.

Van Dyke, J., and Harrison, J., concurred.

[L. A. No. 597. Department One.—February 15, 1900.]

WESLEY PERRY, Appellant, v. OTAY IRRIGATION DISTRICT et al., Respondents.

IRRIGATION DISTRICT—PUBLIC CORPORATION—OFFICERS.—An irrigation district is a public corporation, and its officers are public officers.

ID.—ASSESSMENTS COLLECTED—SALARY AND EXPENSES OF COLLECTOR—SETOFF.—Assessments collected by the collector of an irrigation district constitute a public fund, and not private property; and the collector cannot offset against such fund his claim for salary, commissions, and expenses paid out in litigation, but his claim therefor can only be paid out of the treasury after allowance by the board, and upon a warrant properly drawn therefor.

ID.—ILLEGAL COLLECTIONS.—The fact that the moneys received by the collector for assessments were illegally collected cannot affect the duty of the collector to pay them over into the treasury of the district. If they were paid without protest, they cannot be recovered back; but, whether so or not, all moneys collected by the collector in his official capacity for and on behalf of the irrigation district belong to the district.

APPEAL from a judgment of the Superior Court of San Diego County. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

C. H. Rippy, and Withington & Carter, for Appellant.

D. L. Murdock, for Respondents.

VAN DYKE, J.—The plaintiff was collector of the Otay Irrigation District, San Diego county, from November 7, 1892, to March 5, 1895. Defendant Isaac Smith was elected and qualified as his successor in office March 5, 1895, and said Smith thereupon made demand on the plaintiff that he turn over the money in his hands belonging to the district, which the plaintiff refused to do; afterward, Smith resigned as collector and was appointed treasurer of the district. There seems to have been some informality in the approval of Smith's bond as treasurer, and he was reappointed June 4, 1895, and thereupon gave bond and duly qualified as treasurer. Smith again demanded of the plaintiff that he turn over the money in his hands belonging to the district, which was again refused. It is alleged in the plaintiff's complaint that such refusals were upon the advice of his counsel, and adds: "Thereupon, and on April 27, 1895, the board of directors of said district, by resolution duly passed and entered of record in the records of said district, declared that the plaintiff must be regarded as a person to be proceeded against for embezzlement of the funds of said district, and appointed a committee to prosecute a criminal action against the plaintiff." Hence the plaintiff brought this action, and deposited with the clerk of the court the sum of five hundred and eighteen dollars and sixty-one cents, the amount in his hands as collector, and demands that his claim for salary and fees, and expenses paid out in litigation in reference to said district, be offset against said sum, and that he be "exonerated and discharged from all liability in respect thereto, based upon his custody thereof as collector as aforesaid of said district, or otherwise, and for all proper relief." The defendants, the irrigation district and Smith, filed an answer and cross-complaint, and none of the numerous other defendants were served or appeared in the action.

The trial court found that plaintiff was the collector of the defendant district for the period stated, and that, as such col-

lector, in his official capacity, he collected and had in his hands at the time of filing of the complaint the sum of five hundred and eighteen dollars and sixty-one cents (paid in to the clerk of the court at that time), belonging to the said district, and which he had failed to turn over to the treasurer of said district.

Judgment was accordingly awarded to the Otay Irrigation District, defendant, for the said sum in the hands of the clerk, together with costs, and directing said clerk to pay said sum to the said defendant, Otay Irrigation District. Plaintiff appeals from the judgment upon the judgment-roll and a bill of exceptions.

The main contention of the appellant is, that the money which the district seeks to recover in the action does not constitute public funds, for which he would be liable on his bond, and that he has a right to set off any sum due him for salary commissions, or expenses, incurred in or about the business of the district. The expenses incurred consisted principally in the payment of costs and disbursements in the litigation, wherein it appears that the appellant was not in accord with the board of directors of the district, and such proceedings were conducted and prosecuted by the appellant without the consent, and against the wish, of said board.

From the provisions of the act to provide for the organization and government of irrigation districts (Stats. 1887, p. 29) it is very clear that the officers of such districts are public officers, and not private employees, and that the duties of collector of such district, under and in pursuance of the law, are public official duties. Section 33 of said act provides that on the first Monday of each month the collector must settle with the secretary of the board for all moneys collected for assessments, and pay the same over to the treasurer; and within six days thereafter he must deliver to and file in the office of the secretary a statement, under oath, showing: "1. An account of all his transactions and receipts since his last settlement; 2. That all money collected by him as collector has been paid. The collector shall also file in the office of the secretary, on said first Monday in each month, the receipt of the treasurer for the money so paid."

By section 39 the compensation of the board of directors is fixed at four dollars per day, and mileage, and it is further

provided that the board "shall fix the compensation to be paid to the other officers named in the act, to be paid out of the treasury of the district." By section 36 it is provided: "No claim shall be paid by the treasurer until allowed by the board, and only upon a warrant signed by the president and countersigned by the secretary."

In *In re Madera Irr. Dist.*, 92 Cal. 321, 27 Am. St. Rep. 106, it is said: "That an irrigation district organized under the act in question becomes a public corporation is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. It can be organized only at the instance of the board of supervisors of the county—the legislative body of one of the constitutional subdivisions of the state; its organization can be effected only upon the vote of the qualified electors within its boundaries; its officers are chosen under the sanction and with the formalities required at all public elections in the state—the officers of such election being required to act under the sanction of an oath, and being authorized to administer oaths when required, for the purpose of conducting the election; and the officers, when elected, being required to execute official bonds to the state of California, approved by a judge of the superior court. The district officers thus become public officers of the state." In *People v. Selma Irr. Dist.*, 98 Cal. 208, the foregoing case of the Madera Irrigation District was cited with approval, and the court added: "The defendant is a public corporation, organized under a general law of the state enacted by the legislature for the purpose of promoting the general welfare." See, also, *Quint v. Hoffman*, 103 Cal. 506.) In *Fallbrook Irr. Dist v. Bradley*, 164 U. S. 174, the supreme court of the United States says: "The formation of one of these irrigation districts amounts to the creation of a public corporation, and their officers are public officers."

The appellant seems to think that because the money collected was in the nature of an assessment instead of a tax, that the fund was in the nature of private property of the district, against which he had a right of offset for the claim alleged to be due him. In the Fallbrook case, *supra*, the distinction between an assessment and a tax is noted by the court as follows: "Although there is a marked distinction

between an assessment for a local improvement and the levy for a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation." The money collected, whether by assessment or tax, constitutes a public fund and not private property. In *New Orleans v. Finnerty*, 27 La. Ann. 681, 21 Am. Rep. 569, it is said: "Compensation takes place between individuals when the debts due by the respective parties are equally due and demandable and where the character of the debt is the same." It cannot be opposed by a fiduciary acting in the line of his duty, the court saying: "But nowhere do we find any authority which sustains the propositions that a public officer charged with the performance of a specific duty, for a fixed compensation to be paid in a manner pointed out by law, has any right to plead in compensation a sum which is in his hands simply because he had not done his duty by depositing it with the proper officer as soon as he had received it, against his salary, and the salary of other officers in his department, and the expenses of the office." To the same effect, 19 Am. & Eng. Ency. of Law, 933, under the head of "Public Officers."

And it is no defense that the moneys from the assessments were illegally collected. In *People v. Van Ness*, 79 Cal. 84, 12 Am. St. Rep. 134, the commissioner of immigration, upon being required to render to the controller a detailed statement of the receipts, and to pay the same into the state treasury, refused to do so on the ground that the money collected by him was without legal sanction. In reference to this contention the court say: "It is now contended by Van Ness that, as this money was collected by him without legal sanction, he had a right to retain it as his own, and as he did not retain it, but paid in into the treasury, he should have been credited with it by the court below, and that the amount should be deducted by this court from the amount of the judgment. We cannot give our sanction to this contention. The money having been collected under color of office, it should have been paid into the state treasury, and did not belong in any view to Van Ness, and he had no right to retain it."

If the money collected was paid by the parties assessed

without protest, although such assessment may have been illegal, the payments were voluntary, and they could not recover back the money so paid. But, in any case, having been collected by the appellant in his official capacity for and on behalf of the irrigation district, as already seen, the money belonged to such district, and it was his duty to pay it over according to the provisions of the law for the government of such districts.

Judgment affirmed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1669. In Bank.—February 16, 1900.]

THE PEOPLE ex rel. W. N. MOORE, Appellant, v. E. W. KING, Respondent.

STATE HOSPITAL—INSANITY LAW—QUALIFICATIONS OF MEDICAL SUPERINTENDENT.—Under the "insanity law" of March 31, 1897, establishing a state lunacy commission for state hospitals, theretofore known as state insane asylums, the qualifications prescribed for the medical superintendent are imperative, and the board of managers of a state hospital cannot appoint a medical superintendent for the hospital, who has not had at least three years' experience in the care and treatment of the insane.

ID.—RIGHTS OF FORMER SUPERINTENDENT.—A new appointee, not possessing the qualifications prescribed by the law of 1897, cannot oust the former medical superintendent of the insane asylum, who has the requisite qualifications, though his term of office has expired, he being entitled to hold over as medical superintendent under the act of 1897 until a qualified successor takes his place.

ID.—INSANITY LAW CONSTITUTIONAL.—The insanity law is not special legislation, nor devoid of uniform operation, nor does it embrace subjects not expressed in its title; but it is in all of these respects valid and constitutional.

APPEAL from a judgment of the Superior Court of Mendocino County. Albert G. Burnett, Judge.

The facts are stated in the opinion of the court.

J. A. Cooper, and W. F. Fitzgerald, Attorney General, for Appellant.

Beverly L. Hodghead, and B. B. Carpenter, for Respondent.

McFARLAND, J.—This action is brought under section 803 et seq. of the Code of Civil Procedure in the name of the people on the relation of W. N. Moore, to determine the right to the office of medical superintendent of the Mendocino State Hospital. The court below entered judgment for defendant Plaintiff appealed from the judgment, and the case is presented here on the judgment-roll and a bill of exceptions.

By an act of the legislature approved February 20, 1889 (Stats. 1889, p. 25), the "Mendocino State Insane Asylum" was established at Ukiah in Mendocino county. It was under the general management of a board of directors, consisting of five persons, appointed as provided in the act; and it was provided that the board "shall elect a medical superintendent, whose term of office shall be four years, and until his successor is elected and qualified, and henceforth the directors shall elect the medical superintendent when it becomes necessary by the expiration of his term of office or by the occurrence of a vacancy in said office." On the first day of April, 1893, the defendant King was regularly appointed to said office of medical superintendent for the term as prescribed in the act. The qualifications of superintendent under that act were that: "The medical superintendent shall be a well-educated and experienced physician and a regular graduate in medicine, and shall have practiced at least five years from the date of his diploma." Four years from the date of his appointment had expired on April 1, 1897, but he has since held the office upon the ground that no successor has been elected and qualified.

On March 31, 1897, an act was passed by the legislature entitled, "An act to establish a state lunacy commission," etc., which is called in the first section thereof the "insanity law," and which by its terms went into effect on said March 31, 1897. This act is claimed by respondent to be a revision of the entire law upon the subject of insane asylums, and, therefore, a repeal of all former laws upon that subject. It establishes certain institutions which are called "state hospitals" at the various places where institutions called "insane asylums" had been formerly established. Among others, it establishes "Mendocino State Hospital," near the city of Ukiah, county of Mendocino, hitherto known as the

"Mendocino State Insane Asylum at Ukiah." It provides for medical superintendents of these hospitals, and as to the qualifications of such superintendents its language is as follows: "A medical superintendent, who shall be a well-educated physician, a graduate of an incorporated medical college, of good moral character, and who has had not less than three years' experience in the care and treatment of the insane." It provides that each hospital shall be under the control of a board of five persons to be appointed by the governor, who are called "managers or trustee"; and the managers for the Mendocino State Hospital having been duly appointed by the governor, the board, in September, 1897, regularly appointed the appellant, W. N. Moore, medical superintendent of said hospital. He qualified by duly taking the official oath, and demanded possession of the office of the respondent King, who refused to deliver the same; and this action was then commenced. The court found that the appellant was not qualified for said office because he "had not, nor had he at the time of the commencement of this action, had three years' experience, and has not had three years' experience in the care and treatment of the insane." This finding is supported by the evidence, and under the said statute of 1897 makes the appellant disqualified to hold said office. The only evidence upon this point consists of the testimony of the appellant himself. This testimony merely shows that for about a dozen years he had been a physician in general practice; that in the course of his practice he had been called upon to prescribe for a number of persons suffering under different kinds of mental disease, some of whom he says were insane; that he did not claim to be a specialist or expert in the treatment of mental diseases and that he knew no reason why persons suffering under such diseases should come to him rather than to any other general practitioner. Upon cross-examination he said: "I have no institution for the treatment of the insane myself, and have never been connected with any institution for the care or treatment of the insane. I had parties under my care just the same as other patients. I would visit them whenever I was called to do so, or whenever I thought professional calls were necessary. I attended them the same as I did persons suffering from other diseases. That is the extent of the care I have given those

persons. I mean by 'hygienic treatment,' the application of remedies suitable to the trouble. I don't know that my practice has been different from that of other general practitioners."

In view of the facts thus established, to hold that the relator has the statutory qualifications for the office of medical superintendent would be to wholly ignore the language of the insanity law. This language is made more emphatic and pointed by the fact that it creates a new qualification, and one additional to those prescribed by all former statutes for medical superintendents of insane asylums. The former qualifications were simply that the superintendent should be "a well-educated and experienced physician and a regular graduate of medicine, and shall have practiced at least five years from the date of his diploma"; and by no admissible construction can it be held that the legislature did not intend to add another and special qualification when it further provided that he must have had "not less than three years' experience in the care and treatment of the insane." This latter provision cannot be "explained away." If it could be construed to mean nothing more than former provisions on the subject, there would be no reason for its enactment, and it would have to be held that the legislature did an idle and meaningless thing. It is not necessary to determine whether or not the appointee must have been employed for three years in some asylum or institution, either public or private, used exclusively for the confinement and treatment of insane persons—although the use of the word "care" as well as treatment of the insane very strongly suggests that conclusion; but the qualification certainly does not include a mere general practitioner, like the relator, who, in the course of his practice, occasionally meets and prescribes for a person afflicted with some mental disease, and who is not and does not pretend to be a specialist in insanity cases, and who has not made the care and treatment of the insane a special study, nor followed it, for any length of time whatever, as a special vocation. The policy of the provision under consideration is entirely a matter for legislative determination.

As the respondent was entitled to hold the office until a qualified successor should be legally elected to take his place,

there was no ground for a judgment that he "wrongfully usurps, holds, occupies," etc., the said office; therefore there is no error in any part of the judgment rendered by the court below.

Respondent contends that the managers of the hospital had no power to legally elect the appellant, even if he had been qualified to hold the office. The insanity law nowhere expressly provides that the managers may appoint a successor to a medical superintendent after his term of four years has expired, and, indeed, it does not provide for any term of office of the superintendent whatever; it merely provides that they may appoint a medical superintendent, and certain other named officers, "as often as vacancies occur therein." Respondent contends that the insanity law was intended to be and is a revision of the whole subject of the management of the insane, and that it therefore takes the place of all former laws upon the subject and repeals all such laws; that under judicial decisions a vacancy in an office does not occur when there is a person in the office presently entitled to hold the same, and occurs only when by death, or resignation, or removal, etc., the office is entirely unoccupied; and that, as the managers are given no power to appoint a successor, there is no vacancy which they are entitled to fill. This contention has certainly great plausibility, for the insanity law with respect to this matter is certainly very loose and indefinite; but we are not called upon in this case to pass upon the merits of the contention, and it is to be hoped that the legislature will amend the law so as to clear up these difficulties, and thus make a judicial determination of the questions thus raised unnecessary.

With respect to the contention of appellant that the insanity law is unconstitutional, first, because it is special legislation and does not have a uniform operation, and, second, that it embraces subjects not expressed in its title, it is sufficient to say that the contention is not maintainable upon either of the grounds specified.

The judgment appealed from is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J., Temple, J., and Henshaw, J., concurred.

[S. F. No. 2093. In Bank.—February 16, 1900.]

HIBERNIA SAVINGS AND LOAN SOCIETY, Appellant,
v. R. S. THORNTON, Executor, etc., Respondent.

ACTION UPON NOTE—RECITAL OF MORTGAGE IN NOTE—PLEADING—PRIMA FACIE EVIDENCE—NONSUIT.—In an action upon a note which contains a recital that it is secured by mortgage, though such recital may not be sufficient as a statement of fact in a pleading, yet when the note was offered in evidence, the recital became *prima facie* evidence of the fact stated, and a nonsuit was properly granted, upon the ground that the note was secured by mortgage, and that no action was brought to foreclose it.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Tobin & Tobin, for Appellant.

B. B. Newman, for Respondent

GAROUTTE, J.—This is an action brought upon a promissory note. Plaintiff having introduced the note in evidence and rested, a motion for a nonsuit was made by defendant and granted, whereupon plaintiff appeals.

The motion for a nonsuit was made and granted upon the ground that the promissory note upon which the action was brought was secured by a mortgage, and that no action was brought to foreclose the mortgage. It is now insisted by plaintiff that there is no evidence in the record showing the note to have been secured by a mortgage. The note was introduced in evidence, and among other matters it recited: "And if default be made in the payment of the principal sum, as above provided, it shall bear interest thereafter until paid at the rate of two per cent per month. This note secured by a mortgage of even date herewith." Upon a previous appeal in this case (*Hibernia Sav. etc. Soc. v. Thornton*, 117 Cal. 481) it was held that the complaint contained no allegation that the promissory note was secured by a mortgage. The complaint at that time was the same as

we have in this record, and contained in the body thereof a copy of the note. Upon that appeal the court said: "There is, however, no averment in the complaint that the note was secured by a mortgage, and the recital to that effect in the note cannot, as matter of pleading, be treated as the equivalent of such averment. It is only by inference or argument from this recital that it can be assumed that a mortgage was ever executed, and the rule is as much in force under the code as at common law that argumentative pleading is not permissible."

Plaintiff now rests this appeal upon the construction of the pleading declared by the foregoing language. But a material difference at once presents itself between the case at bar and the case presented upon the previous appeal. The court, upon that appeal, was dealing with the pleading as such, while upon this appeal it is dealing with the evidence as such. While the recital, "this note secured by a mortgage of even date herewith," may not be sufficient as a statement of fact, viewed from the standpoint of good pleading, still that recital may be sufficient evidence *prima facie* to establish the fact as matter of proof. In this case the plaintiff offered the note in evidence, and thereafter it became *prima facie* evidence of any facts recited therein. It necessarily follows that upon the introduction of the note in evidence it appeared to the court from its face that it was secured by a mortgage. For this reason the judgment of nonsuit was properly granted.

Judgment and order affirmed.

Van Dyke, J., Harrison, J., McFarland, J., and Beatty, C. J., concurred.

TEMPLE, J., concurring.—I concur. Considering the phrase "this note is secured by mortgage of even date herewith" as a mere recital, it is still *prima facie* evidence of the fact stated as against the payee, but I think the phrase is something more than a mere recital. It is a part of the stipulation in the contract. A clause which substantially changes the nature of the obligation, and which binds the obligor to do something different from what he would be bound to do but for such clause, must be considered a part of the contract as distinguished from a mere recital. If this be not so, it would be difficult to state what the difference is.

Without this clause the note would be an absolute agreement to pay fourteen hundred dollars. Inserting the clause it ceases to be an agreement to pay fourteen hundred dollars, but is an agreement that a certain special fund shall suffice to pay it, and if after that fund has been so applied there is a deficiency, the obligor will pay such deficiency. (*Biddel v. Brizzolara*, 64 Cal. 354; *Brown v. Willis*, 67 Cal. 235; *Powell v. Patison*, 100 Cal. 236; *McKean v. German-American Bank*, 118 Cal. 336; *Woodward v. Brown*, 119 Cal. 283; *Savings Bank v. Central Market Co.*, 122 Cal. 28.)

The contract sued upon when introduced as evidence showed upon its face that a personal action could not be brought upon it. It may be said that this position is inconsistent with the views expressed upon the former appeal. But the position here taken was not presented to the court on that appeal and was not discussed. I think the court in that case, however, did not intend to overrule a long line of decisions which hold that where an agreement is unambiguous it may be pleaded by setting it out *in hæc verba*. (*Stoddard v. Treadwell*, 26 Cal. 294; *Love v. Sierra Nevada Lake Water etc. Co.*, 32 Cal. 694; 91 Am. Dec. 602; *Hallock v. Jaudin*, 34 Cal. 167; *Joseph v. Holt*, 37 Cal. 253; *Murdock v. Brooks*, 38 Cal. 596; *Lambert v. Haskell*, 80 Cal. 613; *Stow v. Schiefferly*, 120 Cal. 609.)

The matter is very fully discussed in *Lambert v. Haskell*, *supra*. Speaking of the objection in that case the court said: "The objection goes, in effect, to the long existing and well-established practice of pleading by setting forth in full the instrument upon which the action or defense is founded. For there can be no difference between setting forth such instrument in the body of the pleading and making it a part of the pleading by proper reference. In each case the copy is part of the pleading." This, it is said, is the better mode of pleading. But this does not obviate the necessity of alleging the necessary preliminary facts, even though they are recited in the written instrument. "Whatever may be the effect of such recitals as evidence, they cannot serve as allegations of pleading." In that case the necessary preliminary allegations were made and the undertaking sued upon was made an exhibit to the complaint and by reference incorporated into it. "This was a sufficient showing of the

terms of the contract, 'and the condition upon which their liability was to arise.'" The contract sued upon, as contradistinguished from mere recitals contained in it, was part of the pleadings.

This is, I presume, what was intended by the decision referred to, and as I have stated, the point that the clause was a substantial part of the contract sued upon was not suggested. No one, then, claimed that it was so. Had such been the contention I am sure the result would have been different.

[S. F. No. 1027. In Bank.—February 16, 1900.]

L. C. WILLIAMS et al., Appellants, v. THOMAS I. BERGIN, Respondent.

STREET ASSESSMENT—NEW ASSESSMENT—PLEADING—RESOLUTION OF BOARD UPON APPEAL—DUE PASSAGE.—A complaint upon a new street assessment, which alleges that, upon appeal from the original assessment, the board of supervisors "duly made and passed" a resolution setting the assessment aside, and directing the superintendent to issue a new assessment, warrant, and diagram, sufficiently states in legal effect, under section 456 of the Code of Civil Procedure, that everything necessary to be done to give the resolution validity has been done.

ID.—AVERMENTS AS TO RETURNS—PREFERENCE TO PREVIOUS AVERMENTS OF DEMAND.—Where the demand alleged is fully set forth in the complaint, and accords with the provisions of the statute, an averment that the return stated the nature and character of the demand "as set forth aforesaid" sufficiently alleges a return complying with the requirements of the statute as to such statement.

ID.—ASSESSMENT TO UNKNOWN OWNERS—PART PAYMENT BY OWNERS OF HALF OF LOT—STATEMENT IN RETURN—LIEN NOT RELEASED.—Where one-half of the assessment of a lot to unknown owners was paid by the owners of half of the lot between the making of the demand and the return, it is proper so to state in the return; but the lien against the lot is an entirety for the whole and every part of the assessment, and such part payment cannot have the effect to release any part of the lot assessed from the lien for the amount remaining unpaid.

ID.—NOTICE OF AWARD—"CONSPICUOUS" POSTING—FORM OF AVERMENT—DEMURRER.—The objection that the complaint does not allege that the notice of award was posted "conspicuously" by the clerk goes

to the form of the allegation, rather than its substance, and can only be reached by special demurrer. The allegation that such notice was posted by the clerk is sufficient as against a general demurrer.

Id.—TIME OF COMMENCEMENT OF WORK.—It is not necessary that the superintendent of streets should fix in the contract the "day" upon which the work should commence; but it is sufficient that the time be fixed as within a specified number of days from the date of the contract.

Id.—DEMAND AND RETURN BY AGENT—SUFFICIENCY OF AVERMENTS.—Averments in the complaint that a certain person, as agent of the plaintiffs, on a specified day, with and by virtue of the warrant, assessment, and diagram entered upon the lot and publicly demanded thereon payment of the amount of the assessment, and returned the warrant to the superintendent, with a statement of the nature and character of the demand indorsed thereupon signed and verified by him, sufficiently state a demand and return made by such person at the instance of the plaintiffs. It is not necessary to set forth the terms of the agency, or to allege specifically that the plaintiffs had authorized such person to make the demand.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The complaint alleged that the superintendent of streets fixed the time in the contract for the commencement of the work "to be within fourteen days from the date of said contract." Further facts are stated in the opinion of the court.

J. C. Bates, for Appellants.

•T. I. Bergin, for Respondent.

HARRISON, J.—Action upon a street assessment.

The respondent demurred to the complaint upon the ground of ambiguity and want of facts sufficient to constitute a cause of action, and, his demurrer having been sustained, judgment of dismissal was entered in his favor. Plaintiffs have appealed.

The complaint alleges that after the completion of the contract an assessment was made and issued on the sixth day of May, 1892, and thereafter on the 14th of May, 1892, the contractor appealed therefrom to the board of supervisors; that the board of supervisors fixed a time and place for hearing said appeal, of which notice was given to all persons interested therein, and that on August 5, 1895, the

day fixed for said hearing, the board duly made and passed a resolution setting aside the assessment, and directing the superintendent of streets to make and issue a new assessment, warrant, and diagram. In conformity with this order the superintendent made the assessment upon which the present action was brought.

Section 11 of the street improvement act provides that an appeal from the assessment may be taken "within thirty days after the date of the warrant," and it is claimed by the respondent that no appeal could be taken until after the issuance of the warrant; that the complaint is defective in failing to allege that a warrant had been issued prior to taking the appeal, and thus fails to show that the board of supervisors had any jurisdiction to set aside the assessment appealed from, and, therefore, the assessment sued on is without any validity. The complaint, however, alleges that the board of supervisors "duly made and passed" the resolution setting the assessment aside and directing the superintendent to issue a new one, and under the provisions of section 456 of the Code of Civil Procedure, this allegation "is a statement in legal effect that everything necessary to be done to give the resolution validity has been done." (*Pacific Pav. Co. v. Bolton*, 97 Cal. 8.)

The complaint alleges that one C. B. Williams, as agent of the plaintiffs herein, on a certain day, with and by virtue of the warrant, assessment, and diagram, went upon the lot of land described in the complaint and while thereon publicly demanded payment of the sum of three hundred and nineteen dollars and fourteen cents, the amount assessed to said lot; that the defendants have not paid the same nor any part thereof, except that one-half of the amount so assessed against the lot, viz., one hundred and fifty-nine dollars and fifty-seven cents, has been paid by the owners of one-half of the lot—the defendants other than the respondent; that thereafter the warrant was duly returned to the superintendent, with a return indorsed thereon signed by said Williams, verified by his oath, stating the nature and character of the demand as set forth aforesaid, and that the amount assessed upon the lot has been demanded as stated aforesaid, and that one hundred and fifty-nine dollars and fifty-seven cents thereof still remained unpaid.

These averments sufficiently state a demand for the amount of the assessment, and the return thereof, and that

the same were made at the instance of the plaintiffs. Section 10 of the street improvement act authorizes the demand and return to be made by the contractor or his assigns, "or some person in his or their behalf." It was not necessary to set forth in the complaint the terms of Williams' agency, or to specifically allege that the plaintiffs had authorized him to make the demand. The demand as alleged was in accordance with the provision of the statute, and the averment that the return stated the nature and character of the demand "as set forth aforesaid" is a sufficient allegation of this fact. If the return when offered in evidence does not comply with the requirements of the statute, it will be merely a case where the proofs do not come up to the averments.

If a portion of the amount assessed was paid between the making of the demand and the return thereof, it was proper to so state in the return. The payment of a portion of the assessment did not release any part of the lot assessed from the lien for the amount remaining unpaid. The lien was against the lot as an entirety for the whole and every part of the amount of the assessment. The assessment was to "unknown" owners, and the payment by one of several co-owners of his proportion of the assessment had no more effect to release any portion of the lot from the lien than would the payment of such portion had he been the sole owner of the lot.

The objection to the complaint that it does not allege that the notice of award was posted "conspicuously" by the clerk goes to the form of the allegation rather than to the fact necessary to be alleged, and should have been presented by special demurrer. As against a general demurrer, the allegation that the notice was posted sufficiently states that this step was taken in the proceedings. (*California Improvement Co. v. Reynolds*, 123 Cal. 88.)

It was not necessary that the superintendent of streets should fix in the contract the "day" upon which the work should commence. (*Rauer v. Lowe*, 107 Cal. 229.)

The judgment is reversed, and the superior court is directed to overrule the demurrer and allow the respondent to answer the complaint within such time as it may deem appropriate.

Garoutte, J., Van Dyke, J., Temple, J., and Henshaw, J., concurred.

[Sac. No. 705. Department Two.—February 16, 1900.]

In the Matter of the Estate of CHARLES W. CARPENTER, Deceased. ABEL F. CARPENTER et al., Appellants, v. C. K. BAILEY et al., Respondents.

BILL OF EXCEPTIONS—SETTLEMENT—FILING.—A bill of exceptions to the ruling of a judge, if not presented at the time of the ruling, must be presented and settled upon notice pursuant to the statute, and must then be filed.

ID.—SETTLEMENT BY EX-JUDGE—DELAY IN FILING.—A bill of exceptions settled by an ex-judge, not dated, and not filed until nine years after the ruling excepted to, is not in time, and cannot be considered.

ID.—SETTLEMENT BY SUCCEEDING JUDGE.—A bill of exceptions relating to matters transacted before a former superior judge, and not to be used on motion for a new trial, must be settled by him if living, and willing to settle it, and a succeeding judge has no authority to settle the bill, if it does not appear that the former judge was dead, or had refused to settle it.

ID.—INSUFFICIENT BILL—ABSENCE OF EXCEPTION—STATEMENT OF FACTS—IMPROPER SETTLEMENT.—A so-called bill of exceptions, stating no exception, and reciting facts and many things not transpiring in court, and not properly settled, cannot be noticed. A bill stating no exception shows no reason for any statement of facts, which should only be inserted to explain exceptions shown to have been taken.

ID.—INSUFFICIENT REFERENCE TO DOCUMENTS.—A bill of exceptions containing a reference to certain papers, "being the papers set forth and marked exhibits 'A' and 'B' in the foregoing bill of exceptions hereto attached and herewith filed," does not sufficiently refer to exhibits so marked in a separate bill of exceptions not attached and separately filed.

CONTEST OF WILL—ARBITRATION—ESTOPPEL OF PROPONENTS.—The matter of the contest of a will cannot be submitted to arbitration, and the proponents of the will cannot be estopped by an award thereunder to insist upon the probate of the will, especially where the principal beneficiary under the will is a minor, and the arbitrator is to make his award without evidence, and to determine from his own judgment what is a reasonable, just, and equitable amount to be set over to the contestants by the beneficiaries under the will.

ID.—PROBATE OF WILL—PROCEEDING IN REM—STIPULATION OF HEIRS.—The matter of the probate of a will is a proceeding *in rem*, binding on the whole world; and a few persons claiming to be heirs cannot by stipulation determine a controversy in reference to that matter.

- ID.—EVIDENCE—ISSUE OF INSANITY—DISCRETION.**—The admission of evidence upon the issue of insanity is largely in the discretion of the court, and is not ground of reversal if no abuse of discretion appears.
- ID.—REJECTION OF EVIDENCE—RELEVANCE AND MATERIALITY NOT SHOWN** The rejection of evidence offered by the contestants, which might have been material, if taken in connection with other evidence, does not appear to be ground for reversal, where the evidence is not brought up, and where the offer was not accompanied by any statement showing its relevancy, or the purpose for which it was offered.
- ID.—REFUSAL TO SUBMIT ISSUE OF MENACE—EVIDENCE NOT SHOWN—ERROR PRESUMED HARMLESS.**—It is error to refuse to submit to the jury an issue as to whether the will was procured by menace, even if there was no evidence on that issue for the contestants; but, in the absence of such evidence, it would be the duty of the jury to find thereupon for the proponents of the will, and the error must be presumed harmless, upon the appeal of the contestants, where the record does not show that sufficient evidence was introduced to sustain a finding in their favor if made upon that issue.
- ID.—STIPULATION THAT CONTESTANTS INTRODUCED EVIDENCE—INSUFFICIENT SHOWING.**—A stipulation in lieu of the evidence that the "contestants introduced evidence on the issue of menace," is insufficient to show that the evidence adduced would be sufficient to sustain a finding in favor of the contestants. Parties relying upon a stipulation which takes from the appellate court the power to determine an appeal upon the real facts should see that they are sufficient.

APPEAL from a judgment of the Superior Court of San Joaquin County. Edward I. Jones, Judge.

The facts are stated in the opinion of the court.

L. W. Elliott, and A. H. Carpenter, for Appellants.

James A. Louttit, F. H. Smith, and W. W. Middlecoff, for Respondents.

TEMPLE, J.—This is a contest in regard to the will of C. W. Carpenter, deceased, and is the third appeal taken to this court in the proceeding. (*In re Carpenter*, 79 Cal. 382; 94 Cal. 406.) The former appeals were each taken from judgments in favor of the contestants, and upon one trial the jury failed to agree. The judgment from which this appeal was taken was for the proponents.

It will not be necessary to consider appellants' points *seriatim*, or in fact to notice some of them in any way. A few suggestions will dispose of many of them without special discussion.

The transcript contains three bills of exceptions, or documents so entitled. The first is certified to and settled by Hon. J. G. Swinnerton, judge of the superior court, and was filed May 17, 1899. It certifies to an exception as having been taken to a ruling made on the twenty-fifth day of April, 1890, more than nine years prior to the filing of the bill of exceptions. Judge Swinnerton had ceased to be the judge of the court many years before the filing. There is no date to the judge's certificate or to the bill, unless the filing be taken as its date.

Respondents assert that they had no knowledge of the existence of this bill of exceptions until it was filed, but this cannot be so. No judge is authorized to settle or certify to a bill of exceptions without the presence of, or notice to, the opposite party. It is not permissible to think, therefore, that it was a secret or *ex parte* proceeding. It is evidently a bill containing an exception such as is provided for in section 649 of the Code of Civil Procedure. A bill of exceptions under that section must be presented to the judge and settled at the time the ruling is made, and in the presence of the adverse party, and cannot properly be presented to the judge or settled at any other time. This is rendered plain by the provisions of section 651, which provides for bills of exceptions to rulings made after judgment. Exceptions to such rulings may be presented to the judge and settled at the time the ruling is made, or, as provided in section 649, within a short period afterward, upon notice. No notice is required if the bill is presented at the time the ruling was made, because it is presumed that the adverse party is then present; but if not so presented, then and there, the judge is not authorized to settle it save on notice. But whether settled under section 649, or section 650, it was not in time. If settled when the ruling was made, it should then have been filed as the statute directs. The filing would then show that the bill was properly settled so far as time is concerned.

The second so-called bill of exceptions was settled and certified by Judge Jones. So far as it refers to proceedings in court, it relates to matters transacted before and by Judge

Smith, the predecessor of Judge Jones. The so-called bill recites many things which did not transpire in court, concerning which, so far as appears, no showing was made in court. Further, the bill states no exception whatever, and therefore there was no reason for the statement of any facts. Statements of facts in a bill of exceptions are made only to explain the exceptions which it shows were taken. If it were in other respects a proper bill of exceptions, the authority of Judge Jones to settle and certify it is not apparent. It is not a bill of exceptions or statement to be used on a motion for a new trial, and it does not appear that Judge Smith is dead or has refused to settle it. It cannot be noticed.

The third bill of exceptions relates to the trial before Judge Jones, which resulted in the judgment from which this appeal is taken. Among other matters it recites that on the trial the contestants offered in evidence two papers, "being the papers set forth and marked exhibits 'A' and 'B' in the foregoing bill of exceptions hereto attached and herewith filed," etc. It is contended that this reference is to two exhibits contained in the so-called second bill of exceptions, which purport to be an agreement to arbitrate certain matters in controversy and an award made by the arbitrator named in the agreement. The transcript does not show that the second bill of exceptions was attached to the third, but the contrary, as they have separate filings. Contestants proposed to show that the award has never been performed by the proponents, and that they were estopped thereby to insist upon the probate of the will.

The reference to the documents is not sufficient to warrant our considering them, but, if it were, it is quite plain that the matter of the contest cannot be submitted to arbitration. The matter of the probate of a will is a proceeding *in rem* binding on the whole world. A few individuals claiming to be the heirs cannot, by stipulation, determine such controversy. There are many other reasons why this submission cannot be sustained. The principal beneficiary under the will, being a minor, was not bound by it. The terms of the agreement itself are contradictory and absurd. Frank T. Baldwin is to arbitrate the matter, and to get his information as he pleases, neither party having a right to submit any evidence to him. He is to determine "what, under all the circumstances of the case, is a reasonable

just, and equitable amount or portion of said estate to be set over to said contestants in full for all claims of each and every of them." He must fix the amount in money they are to receive, and ascertain the value of the land so the proponents can pay in money or land, and the proponents have five days after the award to determine whether they will pay in money or land.

To determine what would be just, reasonable, and equitable the referee must pass upon the validity of the will. If valid, it would be unjust and grossly inequitable to give the contestants anything. If the will was found to be invalid, the contestants—if they were the heirs, and the only heirs of Carpenter—should have had all of it, and in such case it was absurd to provide that the proponents should pay them for their claim out of their own property. The agreement seems to have been made upon the basis that the will was valid, but the beneficiaries under it should pay the claimants something to induce them to abandon the contest.

Many exceptions were taken at the trial to the rulings of the court as to the admission of testimony offered by proponents upon the issue of insanity. To discuss these exceptions separately would serve no useful purpose. Much is left to the discretion of the trial court upon such matters, and we cannot say that this discretion was abused. One of these rulings—and the most questionable one—had reference to a promissory note which C. K. Bailey, testifying for contestants, stated Carpenter executed and delivered to him just twenty-five days before he died. After such statement contestants asked: "Was there any consideration whatever for that note?" This was objected to as immaterial and irrelevant, and the objection was sustained. It is quite easy to see how the answer to this question may have had, in connection with other testimony, a material bearing upon the power or influence which Bailey had over Carpenter. But the evidence is not brought up, and counsel did not, in connection with the offered testimony, make any statement showing its relevancy or the purpose for which it was offered. I do not think the case should be reversed upon such a showing.

The contestants asked the court to submit to the jury an issue as to whether the will was procured to be executed through menace on the part of C. K. Bailey to the testator,

and the court denied the request. I think this was erroneous, even if there was no evidence upon the subject. In such case the jury would, of course, find against the party which had the laboring oar, which in this case was with the contestants. But whether such refusal is ground for reversal is another question. The earlier cases seem to require a finding upon all issues made by the pleadings, but later it has been held, as in *Himmelman v. Henry*, 84 Cal. 104, "a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue."

In *Winslow v. Gohransen*, 88 Cal. 450, the last-named case was approved, and it was further held that a case would not be reversed unless there was sufficient evidence to sustain a finding in favor of appellant, had one been made. In *Bliss v. Sneath*, 119 Cal. 526, it was held that "this rule applies not only to the issues that are made to the allegations of the complaint by the answer, but also to the issues made by the averment of new matter in the answer."

The rule, then, is that an appellant from a judgment against him in the court below will not be heard to complain that the court failed to find upon some issue tendered by him, unless he brings up the evidence and thereby shows that he litigated that issue in the trial court and introduced evidence upon the issue which would have justified a finding in his favor. One reason for this rule is that, since he had the affirmative upon that issue, if he introduced no evidence, the finding would necessarily have been against him, and, therefore, he is not injured by the failure of the court to make a finding.

In this case the evidence is not brought up, but in lieu of such evidence the parties stipulate that "contestants introduced evidence on the issue of menace."

This is clearly insufficient. It would be true if a witness for contestants, in reply to a question upon the subject, had replied that no menace was made, or if the menace was trifling, or under circumstances which clearly showed that it could have no effect.

Such stipulations, or a certificate of the judge of like purport, to a certain extent take from this court the power to determine the appeal upon the real facts of the case. Parties relying upon them should see that they are sufficient.

The judgment is affirmed.

McFarland, J., and Garoutte, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[L. A. No. 731. Department Two.—February 18, 1900.]

JOSEFA ETCHAS, Respondent, v. LEOPOLDA ORENA,
Executor, etc., Appellant.

- ✓ ACTION FOR SERVICES—STATUTE OF LIMITATIONS—PLEADING.—In an action for the value of services rendered, where the complaint does not show upon its face that the cause of action is barred by the statute of limitations, the plea of the statute cannot be raised by demurrer, but is properly presented by answer.
- ✓ ID.—REJECTED CLAIM AGAINST ESTATE—PART OF CLAIM BARRED BY STATUTE.—Upon the trial of an action upon a rejected claim against the estate of a deceased person, for services rendered at his request, the evidence must be confined to proof of services rendered within two years prior to the death of the decedent. Neither the executor nor the judge had any right to allow any part of the claim which was barred by the statute of limitations.
- | ID.—BROKEN PROMISE TO PROVIDE BY WILL NOT PRESENTED AS A CLAIM. A broken promise to provide by will a compensation for services rendered to the decedent must be presented as a claim against the estate, in order to be relied upon as a continuing contract for services up to the time of his death, and if not so presented, it cannot be relied upon to save the bar of the statute as to part of a rejected claim for services presented against the estate. No other cause of action can be properly alleged or proved than that stated in the claim presented and passed upon by the executor.

APPEAL from a judgment of the Superior Court of Santa Barbara County and from an order denying a new trial. W. S. Day, Judge.

The facts are stated in the opinion.

Thomas McNulta, and B. F. Thomas, for Appellant.

The plaintiff was limited to the cause of action stated in his claim as presented and could not rely upon a promise or cause of action not presented as a claim to defeat the statute of limitations which appeared as a bar upon the face of the claim presented and rejected. (*Estate of Sullenberger*, 72 Cal. 549; *McGrath v. Carroll*, 110 Cal. 79; *Lichtenberg v. McGlynn*, 105 Cal. 45.)

G. H. Gould, C. F. Carrier, and Richards & Carrier, for Respondent.

The action for continuous service under the broken promise to compensate plaintiff by will was maintainable at the termination of the service, upon the death of the decedent; and the service, being continuous, is unaffected by the statute of limitations, prior to its termination. (*Jacobson v. Le Grange*, 3 Johns, 199; *Robinson v. Raynor*, 28 N. Y. 494; *Green v. Orgain* (Tenn. Ch. App., Feb. 7, 1898), 46 S. W. Rep. 477; *Cross v. Dunlavy* (Tenn. Ch. App., Feb. 5, 1898), 46 S. W. Rep. 473; *Cann v. Cann*, 45 W. Va. 563; *Thomas v. Feese* (Ky., May 19, 1899), 51 S. W. Rep. 150; *Borland v. Haven*, 37 Fed. Rep. 394, 413; *Hay v. Peterson*, 6 Wyo., 419; *Wise v. Hogan*, 77 Cal. 184; *McFarland v. Holcomb*, 123 Cal. 84; *Ah How v. Furth*, 13 Wash. 550; *Graves v. Pemberton*, 3 Ind. App. 71; *Baird v. Crank*, 98 Cal. 293.)

COOPER, C.—This action was brought to recover of the defendant, as executor, the reasonable value of services alleged to have been performed by plaintiff for deceased in her lifetime. The case was tried with a jury, and a verdict rendered for plaintiff in the sum of thirteen hundred and seventy-five dollars. A motion for a new trial was denied, and this appeal is from the judgment and order. The deceased died on the nineteenth day of January, 1896. On September 19, 1896, the plaintiff verified and presented a claim against the estate for nine hundred and twenty-four dollars for "services rendered deceased at her special instance and request from June 1, 1895, to January 21, 1896." This claim was rejected

September 28, 1896. On November 30, 1896, the plaintiff verified and presented another claim for the following:

"To services rendered deceased at her request by claimant as companion, and as servant doing household work, cooking, sewing, and nursing from June 1, 1885, to June, 1895, six months in each and every year aforesaid at \$30 a month.....	\$1,800.00	
"And for six months of each and every year aforesaid for services in taking care of house and property of decedent at her request in her absence at the rate of \$5 a month.....	300.00	
	<hr/>	\$2,100.00
"Credit, cash \$50 per year for each and every year during said period.....	500.00	
"Note of \$400.00, dated 1891.....	400.00	
	<hr/>	900.00
		<hr/>
		"\$1,200.00"

The latter claim was rejected December 1, 1896. No other or different claim was presented by plaintiff against said estate. This action is based on the said rejected claims. The complaint alleges that between the first day of June, 1885, and the twenty-first day of January, 1896, plaintiff, at the request of deceased, performed services as companion, doing household work, cooking, sewing, and nursing, and that said services were of the reasonable value of three thousand and twenty-four dollars.

That deceased paid plaintiff the sum of nine hundred dollars by various payments, leaving a balance due of two thousand and one hundred and twenty-four dollars, which has not been paid. "That the said Josefa Loureyro promised plaintiff and agreed to pay her the reasonable value of her services as above set forth, by making provision in her will for plaintiff in a sum equal to the value of the said services, and in consideration of such promise plaintiff rendered the services above described."

The complaint, after alleging the death of deceased, and the appointment of defendant as executor, further alleges the presentation and rejection of the said claims by defendant, copies of which are attached to the complaint as exhibits "A" and "B."

To this complaint a demurrer was interposed on various grounds and overruled. The defendant urges that the complaint did not state facts sufficient to constitute a cause of action, and that it appears upon the face thereof that the cause of action therein stated, if any, is barred by the provisions of subdivision 1, section 339, of the Code of Civil Procedure.

We think the demurrer was properly overruled. The complaint states a cause of action for the reasonable value of services alleged to have been performed by the plaintiff for deceased at her special instance and request. It does not allege the presentation of a claim upon an agreement made in the lifetime of deceased to make provision in her will to pay plaintiff the reasonable value of such services. But that portion of the complaint may be disregarded. It was not demurred to specially and no motion was made to strike it out.

The complaint does not show upon its face that the cause of action is barred. It states a cause of action for the value of such services as the proof might show became due within two years prior to the death of deceased. The demurrer could not properly have been sustained upon the supposition that a part of the cause of action was barred. If some portion of the complaint states a cause of action the general demurrer should be overruled. (*Fleming v. Albeck*, 67 Cal. 227; *McCann v. Pennie*, 100 Cal. 551.) The answer, among other things, contained a direct allegation that the plaintiff's cause of action and every part thereof was barred by subdivision 1, section 339, of the Code of Civil Procedure, and this presents the controlling question upon this appeal. The court below permitted evidence all through the trial of the case as to services from the first day of June, 1885, up to the time of the death of deceased, evidently treating the cause of action as being founded upon a continuing contract for services to be paid for by provision in the will of deceased. This is not only apparent from the rulings of the judge upon the admission of testimony, but is shown by the instructions to the jury, given at plaintiff's request. The court instructed the jury: "That when one is employed continuously to perform personal services, without any time being fixed in the contract for its termination, the statute of limitation does not begin to run until the services are terminated."

"When one person engages the services of another under the promise to make provision by will for the one so employed, the statute of limitations does not begin to run until the death of the employer. If, therefore, you believe from the evidence that Miss Loureyro promised the plaintiff, in consideration of plaintiff's services, to make provision for her by her will, and plaintiff, relying on such promises, performed the services testified to, you must find a verdict for plaintiff for the value of her services during the time she so worked, allowing as a credit upon such indebtedness such sums as were paid by Miss Loureyro to the plaintiff."

We think that upon the trial the evidence should have been confined to such services as became due under the rejected claims within two years of the death of deceased. It is claimed that the deceased, during her life, made a contract with plaintiff that, in consideration of the services to be rendered, and which it is claimed were rendered, deceased would compensate plaintiff by making provision in her will. No question as to the enforcement or validity of such contract need here be determined. If the plaintiff could maintain such action for a breach of contract to pay for services continued for a period of over ten years, it would be necessary to first present a claim against the estate. (Code Civ. Proc., sec. 1493.) It is argued that such presentation was made in the claim of November 30, 1896, for a balance of twelve hundred dollars, but we do not think so. The claim presented was simply for services by the month from June 1, 1885, to June 1, 1895. No contract is set forth as to when the wages were to be paid, and in such case the presumption is that the hiring was by the month. (Civ. Code, secs. 2010, 2011.)

It appears, therefore, on the face of the claim as presented, that all that part of it was barred by the statute except for services that became due on or after January 19, 1894. If barred by the statute of limitations the claim could not be allowed by the executor or the judge. (Code Civ. Proc., sec. 1499.) The executor therefore had no right to allow any part of the claim for services that became due under the claim as set forth prior to January 19, 1894.

The claim, as presented and passed upon by the executor, was the foundation of the plaintiff's cause of action. She

could not come into court and allege and prove any other or different cause of action from that stated in the claim. The executor was entitled to have the claim presented in sufficiently intelligent form to enable him to pass upon it legally. If it was founded upon a promise or agreement, under the terms of which continuous services were performed, to be paid for at the death of deceased, the claim should have so stated. It is the policy of the law that all just debts of an estate shall be paid, and that creditors having claims shall duly make out, verify, and present them in such manner, and with such statement and vouchers, that the representative of the deceased may allow them if legal, and reject them if in law they should be rejected. The claim in this case, as founded upon the promise to provide in the will, was contingent upon the failure of deceased to so provide. If the services were performed in consideration of an agreement to compensate for them in the will, no claim could exist against the estate, except one founded upon the fact that such services were performed and no provision made in the will for compensation. The particulars of the claim should have been stated. In *Aguirre v. Packard*, 14 Cal. 172, 73 Am. Dec. 645, it was held that where the account presented to the administrator for allowance contained no item for interest, and the face of the paper did not show that interest results necessarily from the facts stated in the claim, interest could not be recovered in the action founded upon such claim.

In *Estate of Sullenberger*, 72 Cal. 549, a claim had been allowed against the estate founded upon a promissory note. The note was barred at the time it was allowed. The court on motion set aside the order allowing the claim. Upon appeal here it was claimed that, although the note was barred, it was taken out of the statute by the substitution of a new obligation in its place. It was held that in such case the claim must have been based on the new obligation and not on the note, and that a claim cannot be amended in a matter of substance after the expiration of the time allowed by law in which claims must be presented.

So in the case of *McGrath v. Carroll*, 110 Cal. 79, a claim was presented against the estate for a money demand, which claim appeared on its face to be barred by the statute of lim-

itations and was rejected. Suit was brought upon it, and in the complaint matters in regard to a trust were alleged so as to take the case out of the statute. It was held in such case that the defendant might plead the statute as to the rejected claim and also the variance and nonpresentation of the claim alleged in the complaint. In the opinion it is said: "Every claim must sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it."

In *Lichtenberg v. McGlynn*, 105 Cal. 45, it was held that the plaintiff in an action against an estate upon a rejected claim must recover, if at all, upon the claim rejected, and that he could not recover upon facts which show a different cause of action.

It was said by the supreme court of Oregon in *Willis v. Marks*, 29 Or. 503, that the purpose of requiring the presentation of claims against estates is: "1. To furnish the administrator with pertinent evidence touching their validity and justness by means of which he may determine for himself whether they ought to be paid out of the funds of the estate; and 2. To enable him to justify his acts, in some measure at least, in accounting with the county court."

In this case, suppose the executor had allowed the claim as presented, there is not a word in it to show that it was a continuing claim or founded upon the failure to make provision in the will. The greater part of it appears upon the face thereof to be barred by statute. An executor or administrator should always be careful and not allow any illegal or unjust claim. With all the safeguards given by the law, and with due care upon the part of executors, administrators, and the court, experience has proven that estates are often plundered by unjust claims. The safest course is to follow the substantial requirements of the statute. In this case the plaintiff must rely upon proof of the claims rejected, and upon which the suit is brought. All evidence as to the value and performance of services barred by the statute of limitations should be excluded. The views herein expressed dispose of the material point in the case, and it is not necessary to discuss others.

The judgment and order should be reversed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[Crim. No. 579. In Bank.—February 28, 1900.]

THE PEOPLE, Respondent, v. E. H. ELLSWORTH, Appellant.

CRIMINAL LAW—HOMICIDE—INSANITY—EVIDENCE.—Upon the trial of a defendant charged with murder, where the sole defense is insanity, evidence of the declarations and acts of the defendant indicating that he was in fear of great peril of his life, not offered for the purpose of showing that he had any delusions upon that subject, are incompetent and immaterial to the issue of insanity.

APPEAL from a judgment of the Superior Court of Siskiyou County and from an order denying a new trial. J. S. Beard, Judge.

The facts are stated in the opinion of the court.

Warren & Taylor, and Farragher & Fairchild, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

GAROUTTE, J.—Defendant has been convicted of murder of the second degree, and appeals from the judgment and order denying his motion for a new trial. The single question presented by this appeal arises upon a ruling of the court rejecting certain proposed evidence offered by the defendant. The sole defense was insanity, and we must test the soundness of the court's ruling in view of that defense.

It was proposed to show by the evidence of the witness Shearer, an acquaintance, certain declarations and acts of

defendant. The questions asked the witness, and to which objections were sustained, are as follows: "1. Did he at that time state to you what to your mind showed that he was in great peril of his life? 2. What acts, if any, of the defendant were the acts of fear on his part—what did he do?" In this connection counsel for defendant stated that he proposed to show by the witness "that the defendant was that night in such a great fear, in fact in fear of his life, and he made such statements to this witness—that he was afraid of his life, and insisted that the witness accompany him to his home, stating that he was fearful they would take his life." It appears from the record that the trial court denied the admission of this evidence upon the ground that testimony as to acts and declarations of defendant was not admissible unless counsel also asked the witness his opinion of defendant's sanity or insanity, counsel for defendant at the time stating that he did not intend to ask questions of that kind of the witness. The reason which appears to have moved the court in denying answers to the foregoing questions is not legally sound. The trial court evidently rested its ruling upon section 1870 of the Code of Civil Procedure, which provides that evidence may be given of the "opinion of an intimate acquaintance respecting the mental sanity of the person, the reason for the opinion being given." This section alone refers to cases where opinion evidence may be given, and in no way purports to curtail the right of defendant to show his acts, declarations, etc., as evidence tending to prove his insanity. Whether or not those acts and declarations are simulated is a question of fact for the jury.

Notwithstanding objections to the aforesaid questions were sustained upon an erroneous view of the law, still the court is satisfied the objections were properly sustained and no error was committed. The grounds upon which the ruling of the court was based are immaterial, for the questions were objectionable from any and every standpoint of the record. Let us look at them for a moment in detail.

"1. Did he at that time state to you what to your mind showed that he was in great peril of his life?" The answer to such a question could in no possible degree shed any light upon the inquiry as to whether or not the defendant was

insane at the time he killed the deceased, or even insane at the time of the alleged conversation, which was some months prior to the killing. Whether or not defendant was in great peril of his life at the time he talked to the witness is wholly immaterial as to any question of insanity; and likewise whether or not he told the witness he was in great peril of his life at that time, or showed the witness that he was actually in great peril of his life at that time. The second question is: "What acts, if any, of the defendant were the acts of fear on his part—what did he do?" In connection with this question, as we have seen, the attorney for defendant stated that he proposed to show by the witness "that the defendant was that night in such fear, in fact in fear of his life, and he made such statements to this witness—that he was afraid of his life, and insisted that this witness accompany to his home, stating that he was fearful they would take his life." This proposed evidence contained in the offer of the attorney was clearly incompetent and immaterial to the issue of insanity. If these fears of defendant were well founded, his conduct in seeking the company and protection of his friend upon his way home that night was evidence of sanity, rather than insanity. If the attorney had followed up his offer with the additional offer to prove that these fears of defendant, to the effect that his life was in great peril, were entirely unfounded—that he was in fact in no danger, no peril—then, possibly, some merit would be found in this contention, but not otherwise. Yet right in this connection, and in regard to the same witness, the record discloses the following:

"District Attorney.—Now, I will ask counsel if he intends to show by this witness that the defendant had any delusions.

"Mr. Taylor.—I will state I do not."

If this fear working upon defendant's mind in no degree partook of the character of a delusion, it was inadmissible as in any way tending to prove insanity.

For the foregoing reasons the judgment and order are affirmed.

Harrison, J., Henshaw, J., McFarland, J., Temple, J., and Van Dyke, J., concurred.

[S. F. No. 1229. Department One.—February 21, 1899.]

ALBERT LIMBERG, Respondent, v. GLENWOOD LUMBER COMPANY, Appellant.

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK.—Notwithstanding the negligence of a master in furnishing the servant with defective appliances, the servant assumes the risk of working therewith, and impliedly agrees to release the master from liability therefor, if he either continues to use them with knowledge of their dangerous character and without objection or protest, or continues to use them with like knowledge for an unreasonable time, after notification given to the master of their defective character, and after the servant has no right to expect that the defect will be remedied.

ID.—LAPSE OF UNREASONABLE TIME—QUESTION OF FACT AND LAW.—Generally, the question of reasonable time is one of fact for the jury; but where it appears, without conflict in the evidence, that the servant continued his employment for nine months after notification to the master of the defective appliance, and without any intimation from the master that the defect would be repaired, during all of which time the defect was obvious to his senses, the delay is unreasonable as matter of law, and is fatal to his cause of action for injury resulting from the defect.

ID.—EVIDENCE—REMEDY OF DEFECT AFTER ACCIDENT.—In an action for negligence of a master in furnishing defective appliances, evidence is not admissible to show that the defects were remedied after the accident.

ID.—EXPERT EVIDENCE—SAFETY OF APPLIANCES.—It is not proper, in such an action to admit the testimony of expert witnesses as to what appliances were safe, and what were unsafe. A master is not bound to furnish the safest appliances. The jury is the proper judge of the safety of the appliances actually used; and the safety of other appliances is immaterial.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

D. W. Burchard, and F. E. Spencer, for Appellant.

J. C. Black, for Respondent.

GAROUTTE, J.—Defendant appeals from a judgment

and order denying a motion for a new trial. The action is one for damages for personal injuries, and arises upon the following state of facts, as testified to by the plaintiff and his witnesses:

Plaintiff was a teamster of experience, forty-one years of age. He was hired by defendant to haul lumber with a wagon and four horses. He continued in this employment for a period of eleven months; then, while traveling upon the public road with his loaded wagon, he fell therefrom beneath the wheels, and the loss of a leg was the result. He asserts negligence upon the part of the defendant in this, that the appliances furnished him with which to do the work were defective. These defective appliances consisted of a wagon having no seat, and also of a pair of lines that were too short. It may be conceded that if either of these defects had not existed the accident would not have happened. A short time after the hiring of plaintiff he complained to defendant at two different times that the lines were too short, but never made any complaint as to the lack of a seat upon the wagon. Defendant made no promise to remedy the defective lines, but remained silent when the complaints were made. From the foregoing state of facts it is insisted by defendant that the motion for nonsuit should have been granted, and it is also claimed that the evidence does not support the verdict and judgment. The contention in substance is but a single one, and the sufficiency of the evidence is the question before the court. Testing the facts of this case by the law, we cannot see how plaintiff is entitled to recover. It may be conceded that defendant was negligent in not furnishing plaintiff with proper appliances to do the work. Such concession being made, then the question presented is not strictly one of contributory negligence upon the part of the plaintiff, but, rather, did plaintiff assume the risk of working with these defective appliances? If there had been an express contract between the master and servant that the work should be done without a seat to the wagon, and with these identical lines, clearly that agreement would have barred a recovery in this action. This being so, do not the facts indicate an implied contract to the same effect? While the servant only assumes the dangers and risks necessarily incident to the work to be performed, he may, by contract, either express or implied, also assume the risk of working

with defective appliances. Indeed, many cases go further and sustain the proposition that, where the servant proceeds at the outset to perform his work with defective appliances, having knowledge of the defect, then an implied contract arises to the effect that he assumes the risk—especially so if he is aware of the danger surrounding him by reason of the defect. And to say that the servant assumes the risk is but another way of saying that he impliedly agrees to release the master from liability.

In this case we lay aside any question as to the lack of a seat upon the wagon. If the wagon was defective in this regard, the plaintiff, an expert teamster, by using it for a period of eleven months, without objection or protest of any kind, assumed all of the risks incident to the use of that kind of a wagon. We have found no case in the books involving anything like a similar state of facts which holds that plaintiff may recover damages for injuries received. We know of but a possible exception to the rule, and that would be a case where the servant, though aware of the defect, was not aware of the danger incident to it. That exception cannot be urged here. This defect of the wagon was of a character that the servant, as a reasonably prudent man, must have been aware of the danger incidental to its use. He cannot be allowed to close his eyes to the danger, and thereafter say, "I did not know it was dangerous."

As to the defective lines, additional principles of law are involved to those arising upon the defect of the wagon, for, as to the lines, the plaintiff made complaint to defendant on two different occasions regarding their defective character. Yet when we pause to consider that the last complaint was made more than nine months before the accident, and to consider the additional fact, pregnant with materiality here, that defendant remained silent under the complaint of the servant, and gave no promise to cure the defect, the case as to the two respective defects is not widely variant. Plaintiff knew of the defect, and must have known of the danger that surrounded him by reason of it. Any reasonably prudent man must have been aware of it, and the defendant must be held to be a man of ordinary prudence; indeed it appears that he was an experienced teamster. Here the

master gave no intimation to the servant that he would remedy the defect, and allowed it to continue for nine months without taking a step toward remedying it. Under these circumstances, the servant, at the time of the accident, was not working in expectation that the defect would yet be remedied. After a lapse of nine silent months he had no right to indulge in any such expectation. Many cases hold that when the master, after complaint made, promises to correct the defect, the servant may continue his employment for a reasonable time, relying upon the master's promise, but here we have no promise. We also have the lapse of a most unreasonable time. The mere fact that the servant makes complaint of the defect gives him no right to rely for all future time upon the complaint made, and thus irrevocably fasten a liability upon the master. If the master had positively refused to correct the defect when the complaint was made to him, then certainly the servant would have been forced by the law to do either one of two things--either assume the risk, and thus release the master from liability, or leave the master's employment. In this case the same conditions substantially arose when a reasonable time had gone by after the making of the complaint to the master, and nothing had been done, or even promised. After complaint made, and nine months had come and gone, the plaintiff had no right as a reasonable man to believe that the master would remedy these defective lines.

The law of this question, as declared by text-books and decisions of courts, is in line with the foregoing views. Shearman and Redfield on Negligence, a work more friendly to servants than any other standard text-book, declares: "The latest and best authorities hold that the liability of the master for risks caused by his negligence, which did not exist when the servant accepted the employment, depends upon a 'question of fact whether a servant who works on, appreciating the risk, assumes it voluntarily or endures it, because he feels constrained to.' If he voluntarily continues work with full notice of the risk, he assumes it, but not so if he acts under coercion." There certainly is no question of coercion in this case. It is said in *Stephenson v. Duncan*, 73 Wis. 408, 9 Am. St. Rep. 806: "But if the plaintiff did continue his employment for a reasonable time after the

defendant could have removed the defects, he would then be deemed to have waived his objections and assumed the risk of operating machinery in the unsafe and dangerous condition in which it was." We find the following language in *Hough v. Railway Co.*, 100 U. S. 224: "If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held in that case to have himself risked the dangers which might arise from a use of the engine in such defective condition. But 'there can be no doubt that, where the master has expressly promised to repair a defect, the servant can recover for the injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept.'" (Citing cases.) It is said in *Morbach v. Mining Co.*, 53 Kan. 740: "But if the servant continues in his work an unreasonable length of time after the master has agreed to remedy the defect complained of, or if the danger is imminent or obvious, he assumes the risks incident thereto. Generally, the question of reasonable time is one of fact for the jury; but where a servant has full knowledge of the danger of his employment, as in this case, after his first inquiry, and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait, and after being injured, then claim damages. He should leave his dangerous employment within a reasonable time, on discovery of the master's method of doing business, when he finds that the master will not remedy the danger or fulfill his promise in that respect." (See, also, *Counsell v. Hall*, 145 Mass. 468; *Eureka Co. v. Bass*, 81 Ala. 200; 60 Am. Rep. 152; *Davis v. Graham*, 2 Colo. App. 210.) The only recent case in this state, to our knowledge, where this question has been at all involved, is *Martin v. California Cent. R. R. Co.*, 94 Cal. 326. It was there held that the mere fact of a brakeman knowing that an ap-

pliance was defective and dangerous did not, as matter of law, bar a recovery based upon injuries received by reason of the defect. The element of time was not a material matter in that case and was not considered. And continued user of the appliance, with knowledge of the defect and its dangerous character, was not shown, and the question not discussed. *Magee v. North Pacific Coast R. R. Co.*, 78 Cal. 430, 12 Am. St. Rep. 69, which was relied upon to support the conclusion declared in the Martin case, is not opposed to the views here expressed.

The question here, then resolves itself into this: "At the conclusion of the introduction of evidence at the trial was there a question of fact for the jury to pass upon, as to whether or not plaintiff remained in the employ of defendant for an unreasonable time after his notification to defendant of the defective character of the lines? If that question ever may become a question of law by reason of any particular state of facts, then it would seem that a question of law alone was presented here. There is absolutely no conflict in the evidence. Plaintiff continued his employment for nine months after a notification to defendant of the defect, without any intimation from his master that the defect would be repaired, during all of which time the defective appliance was constantly before his eyes, and also in his hands. We believe that this delay of nine months is a fact absolutely fatal to plaintiff's cause of action. We see no difference in a delay of nine months and a delay of nineteen months, and, as a matter of law, this court must say that plaintiff, continuing for this long period of time in the employment of his master after his notification to the master of the defect, by implied agreement released the master from any liability resulting from injuries received in the use of the appliance; or, as some of the cases declare, plaintiff must be held to have been guilty of contributory negligence in continuing his employment for this long period of time with this defective appliance, a defective appliance of which he well knew, and the danger of its use *ex necessitate* ever present to his mind. In the comparatively early case of *McGlynn v. Brodie*, 31 Cal. 379, this court said: "Where a party works with or in the vicinity of a piece of machinery insufficient for the purposes for which it is employed, or for any other

reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained arising out of accidents resulting from such defective condition of the machinery. This is the principle established by all the cases." In view of the decision in *Martin v. Central Ry. Co.*, *supra*, the aforesaid doctrine may be considered modified, but the modification goes to a limited extent only, for the limitation only goes to the point that the servant, after beginning his employment with a defective appliance, may have the time and opportunity to call the attention of the master to the defect, and the master may have the time and opportunity after the notification to remedy the defect, before it be held that the servant has assumed the risk.

It was error for the court to admit evidence under objection to the effect that the defects were remedied after the accident. In *Sappenfield v. Main Street Ry. Co.*, 91 Cal. 62, the court said: "Such a rule puts an unfair interpretation on human conduct, and virtually holds out an inducement for continued negligence." (See, also, *Hager v. Southern Pac. Co.*, 98 Cal. 311; *Turner v. Hearst*, 115 Cal. 401.) The materiality of this error under the circumstances need not be considered.

It was not proper to admit the testimony of expert witnesses as to what appliances were safe and what were unsafe. As illustrative of this branch of the case the record discloses the following: "Q. Can you state to the jury whether or not it is more safe for a teamster to sit on a bare load of lumber without a seat, or whether it is more safe with a seat for him?" And again: "Q. Can you state whether or not short lines used to drive horses is as safe as long lines without knots?" These questions were objectionable for two reasons: 1. It is not material to the case that the wagon would have been safer with a seat than without it; 2. Neither was it material to the case that longer lines would have been safer than shorter ones. Defendant was not bound to furnish the safest appliances that could be had in the market. Again, the questions cover a subject matter not calling for expert testimony under any circumstances. The jury was the best judge of the safety of the appliance used, and as to the safety

of other appliances which might have been used no such question before the court, and clearly it was not material. (*Sappenfield v. Main Street Ry. Co.*, *supra*; *Kauffman v. Maier*, 94 Cal. 281; *Redfield v. Oakland etc. Ry. Co.*, 112 Cal. 220.)

We find no merit in the contention that the bill of exceptions cannot be considered.

For the reasons stated the judgment and order are reversed and the cause remanded.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

[S. F. No. 1291. Department One.—February 21, 1900.]

R. JOHNSON, Appellant, v. PETER TAUTPHAUS et al.,
Respondents.

MINING CORPORATIONS—ACT FOR PROTECTION OF STOCKHOLDERS—CHANGE OF PENALTY—INDEPENDENT PROVISION—CONSTITUTIONAL LAW.—The change of penalty by the amendment of 1897 to the act of 1874, for the protection of stockholders of mining corporations, so as to limit the recovery for the failure of the directors to post monthly accounts, and weekly statements of superintendents, to the actual damage alleged and proved, is a valid and independent provision, not affected by the question whether the amendment of 1897 is in part unconstitutional, either because it includes foreign corporations not embraced in the title, or because it makes an arbitrary classification of corporations whose stock is listed and offered for sale at public exchange.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The action was brought in November, 1897, by a stockholder of the Eclipse Gravel Mining Company, to recover the sum of one thousand dollars, as provided in the act of 1874 for the protection of the stockholders of mining companies, for alleged breaches of that act, charged to have occurred in the months of June, July, August, September and October of that year. A demurrer to the complaint was sustained, and judgment was entered for the defendants, from which the

plaintiff appealed. Further facts are stated in the opinion of the court.

John W. Cathcart, for Appellant.

Daniel Titus, for Respondents.

GAROUTTE, J.—This is an action brought against the directors of a mining corporation to recover a penalty for failure to post monthly accounts and weekly statements of the superintendent of the company, in accordance with the requirements of an act of the legislature approved March 30, 1874, and the amendment thereto. (Stats. 1897, p. 38.) The amendment to the original act, which was passed in 1897, is now attacked by appellant as unconstitutional.

It is first claimed that this amendment to the act is unconstitutional by reason of the fact that it attempts to deal with foreign corporations when the title of the act only purports to cover corporations "formed under the laws of the state of California." For present purposes, at least, this contention may be conceded to be meritorious. Still, such concession in no way affects this litigation. The result would simply be that foreign corporations would not come within the purview of the act.

The amendment only deals with those domestic mining corporations whose stock is listed and offered for sale at public exchange. It is now claimed that this is special legislation, because it does not include all domestic mining corporations, and that the classification of corporations made by the amendment is arbitrary and not based upon any well-defined natural and intrinsic distinction. This identical question was presented to the court in *Anderson v. Byrnes*, 122 Cal. 272, and the conclusion there declared disposes entirely of plaintiff's contention here. In that case it is said: "The exigencies of the present case do not require the court to pass upon this question of constitutional law. Conceding, for present purposes alone, the contention of plaintiff to be sound, still section 3, as amended, entirely changes the remedy of the stockholder, and therefore necessarily deprived this plaintiff of the remedy offered him under the old act, and which he has sought to enforce. In answer to this con-

tention, plaintiff insists that the amendment changing the remedy is dependent upon the amendment limiting the scope and effect of the act to a certain class of mining corporations, and that amendment, falling to the ground by reason of its unconstitutionality, necessarily carries with it the second amendment to the act. But we see no dependency between these sections causing such a result. We see nothing in the act indicating that the legislature would not have changed the remedy unless that body had first limited the effect of the act to mining corporations whose stock is listed and offered for sale at public exchange; and that is the test when a question of this character is presented to the court for decision."

As the act stood prior to the amendment of 1897, a penalty of one thousand dollars was assessed against the directors failing to comply with its demands. By the amendment a judgment may only be rendered against the directors for the actual damages sustained. By this same amendment foreign mining corporations were brought within the provisions of the act, and certain domestic mining corporations taken out of its provisions. No possible substantial reason can be imagined why this change in the kind of corporations affected by the act furnished the motive in the mind of the legislature which resulted in the penalty clause being stricken out and the actual damage clause inserted. There is no such relationship or dependency existing between these two sections as amended which demands that, if the first must fall by reason of its unconstitutionality, then the second must likewise fall with it. It is clear that the second amendment may stand, though the first may fall.

For the foregoing reasons the judgment is affirmed.

Van Dyke, J., and Harrison, J., concurred.

[S. F. No. 1276. Department One.—February 21, 1900.]

JOHN JOHNSEN, Respondent, v. OAKLAND, SAN
LEANDRO & HAYWARDS ELECTRIC RAILWAY,
Appellant.

**NEGLIGENCE—PROXIMATE CAUSE—UNLAWFUL SPEED OF ELECTRIC-CAR—
BREAKING OF FLANGE—QUESTION FOR JURY.**—The running of an electric-car at an unlawful rate of speed is evidence of negligence, though not *per se* of the proximate cause of injury to the plaintiff; but where the evidence shows that the plaintiff was precipitated from his seat and thrown wholly across the car through a window on the opposite side thereof, to the ground, owing to the breaking of the flange of a wheel upon a curved track, and the throwing of the car violently from the track, it cannot be said as matter of law that the unlawful speed of the car was not the proximate cause of the injury. That question is for the jury to determine from the evidence, and it is their province to decide whether the plaintiff would not have been injured as he was if the car had been traveling at an ordinary and lawful rate of speed.

ID.—LATENT DEFECT IN WHEEL.—The fact that there was a latent defect in the wheel, not discovered or known to exist, after the best-known tests were applied, is not necessarily a complete defense to the action; and is not ground for setting aside the verdict for the plaintiff, which may have been properly based upon a finding that the unlawful speed of the car was the proximate cause of the injury complained of.

ID.—OPINION EVIDENCE OF PASSENGERS—SPEED OF CAR.—The testimony of passengers who were riding on the car at the time of the accident, and who were regular travelers upon this line, the schedule and statutory time of which was eight miles per hour, to the effect that the car was going very fast, and at an unusual rate of speed, was proper evidence to go to the jury. The law recognizes a very broad and liberal rule in the reception of opinion evidence of nonexperts as to the rate of speed at which cars may be traveling.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

Samuel Bell McKee, and Chickering, Thomas & Gregory,
for Appellant.

M. C. Chapman, Frederick E. Whitney, and Tom M. Bradley, for Respondent.

GAROUTTE, J.—Plaintiff has recovered damages for personal injuries received while a passenger upon one of defendant's electric street-cars. The car was going at an unusual and unlawful rate of speed, and while upon a curve, a flange of the car wheel broke, the car left the track, and plaintiff was precipitated to the ground through a window of the car, to his great injury. This appeal of defendant has but little merit.

It is first contended that the excessive speed of the car was not the proximate cause of the accident. This claim is based upon the testimony of defendant's witness to the effect that a perfect wheel of the kind here in use would safely support a similar car running at a speed much greater than the speed of this car at the time of the accident. This may be conceded, and still, under the facts of this case, it might well be said by the jury that the excessive and unlawful rate of speed of the car was the proximate cause of the injury. The jury may well have been justified in saying that after the flange of the wheel broke the car would not have left the track if the speed had not been excessive; or the jury may have gone a step farther and declared that, even though the car would have left the track, still the plaintiff would not have been injured if the car had been traveling at an ordinary and lawful rate of speed. It appears that this plaintiff was thrown across the car against and through the window on the opposite side of the car from where he was sitting. The jury may well have said from the evidence that this would not have happened if the car had been traveling at a proper and lawful rate of speed, notwithstanding the wheel may have broken and the car left the track. If the wheel may have broken and the car left the track, and still the plaintiff not have been injured except for the extraordinary and unusual rate of speed of the car, then it may be well said that the excessive rate of speed was the proximate cause of the injury and not the breaking of the wheel. While the excessive and unlawful rate of speed shows negligence upon the part of defendant, of course that fact, of itself, would not be sufficient to indicate such speed to be the proximate cause of the injury, but, as we have shown, there

are other facts which, taken in connection with the rate of speed, would justify a jury in declaring that the proximate cause of injury was the excessive rate of speed. Appellant in this particular relies upon the late case of *Cox v. Chicago etc. Co.*, 102 Iowa, 711. Yet, upon examination of that case, we find it against him. It is there said: "It does not appear but that the limb which caused the derailment would have been caught up and carried along as it was had the speed of the train been less than it was." And again: "Whatever may be the reason for the rule, we are clearly of the opinion that the speed of the train was not the cause of the accident, that with the limb carried along as it was the accident would have occurred if the speed had been at the rate of three or five miles per hour less than it was. Had the speed been but ten miles per hour, the derailment and overturning of the engine would as surely have followed as it did at thirteen to fifteen miles per hour." It cannot be said in this case, as matter of law, that, if the speed of the car had been but eight miles per hour, the plaintiff would still have been precipitated through the window of the car and have received the injuries suffered.

It is next claimed that the accident to plaintiff was occasioned by a defective wheel, that the defect was latent, and could not be, and was not, discovered by defendant after the best known tests were applied, and this fact constituted a complete defense to the action. The defect in this contention is patent, not latent, and it is this: We have seen that the defective wheel was not necessarily the sole cause or to any degree the direct and proximate cause of the injury; and, even conceding a latent defect in the wheel, and the exercise of the proper amount of care in selecting and using the wheel by defendant, still, for the reasons already suggested, plaintiff's cause of action may have been full of merit, and should have gone to the jury upon the question as to the proximate cause of the injury.

Plaintiff introduced the evidence of various passengers who were riding on the car at the time the accident occurred as to the rate of speed the car was traveling. It is insisted that these witnesses were not competent to give an opinion upon that question. In view of the fact that they were regular

travelers upon this line of cars, and that the schedule and statutory time was eight miles per hour, there can be no question that the testimony given by these witnesses to the effect that the car was going very fast and at an unusual rate of speed was proper evidence to go to the jury; and indeed the law recognizes a very broad and liberal rule in the reception of opinion evidence of nonexperts as to the rate of speed cars may be traveling. As before suggested, these witnesses had been in the habit of traveling upon this line of road, and had at least made casual observation as to the speed of the cars at other times. They were fairly intelligent, and only gave an approximate opinion as to the rate of speed the car was going. The fact that they were passengers upon the car, rather than bystanders, does not bar them from testifying in this regard. The reported cases rejecting the class of evidence here offered are few indeed, while there is an abundance of authority to support its admission. (*Thomas v. Chicago etc. Ry. Co.*, 86 Mich. 496; *Walsh v. Missouri Pac. Ry. Co.*, 102 Mo. 582; *Ward v. Chicago Street etc. Ry. Co.*, 85 Wis. 601.)

We find no merit in the objection to the hypothetical question put to the witness Woolsey. Neither is there substantial merit in the remaining assignments of error.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

[Sac. No. 613. Department One.—February 21, 1900.]

STOCKTON SAVINGS AND LOAN SOCIETY, Respondent, v. N. S. HARROLD et al., Respondents, and JOHN DEMPSTER McKEE, Appellant.

FORECLOSURE OF MORTGAGES—CROSS-COMPLAINT—MORTGAGE OF DISTINCT TRACTS TO SECURE ONE DEBT—NEW PARTIES.—In an action to foreclose two several mortgages executed by each of the makers of a joint and several note to plaintiff, upon his individual property, a subsequent mortgagee, made a party defendant, who holds a note of one of the same makers, secured by a mortgage executed by him and a third person upon a larger tract, and also secured by a subsequent mortgage executed by the same maker upon a wholly distinct tract, may, by cross-complaint, foreclose both of his mortgages, bringing in whatever new parties are necessary to such foreclosure. It is error to strike out from the cross-complaint allegations concerning the mortgage upon the distinct tract securing the same debt secured by the mortgage of the larger tract, which included premises covered by one of plaintiff's mortgages.

ID.—LOSS OF LIEN NOT FORECLOSED.—If the defendant were to sue in an independent action of foreclosure, he would lose the lien of the mortgage of the distinct property securing the same debt, if it were omitted from the foreclosure; and he cannot be compelled to lose part of his security, when foreclosing his mortgages by way of cross-complaint.

ID.—RIGHT OF CROSS-COMPLAINT—ADDITIONAL LAND—NEW PARTIES.—The provision in section 442 of the Code of Civil Procedure for a cross-complaint where affirmative relief is sought affecting the property to which the action relates, only requires that there shall be some connection between the cause of action in the cross-complaint and the property to which the action relates; and the fact that the cause of action of the defendant includes additional land as well as that with which the plaintiff is concerned, and the further fact that new parties are brought in by the cross-complaint, are not tenable objections thereto.

ID.—MORTGAGE OF DISTINCT LAND SECURING DISTINCT NOTES—RESTRICTION OF FORECLOSURE BY CROSS-COMPLAINT—DECREE SAVING LIEN.—Where the mortgage of the distinct tract of land not included in the complaint not only secured a joint note, which was also secured by a mortgage inclusive of part of the land described in the complaint, but also secured a wholly distinct note of one of the parties to the joint note, it cannot be foreclosed by cross-complaint, so far as respects such distinct note; but the decree of foreclosure should save from the effect of the sale the lien of the mortgage securing such distinct note.

Id.—SUCCESSIVE FORECLOSURES—CONSTRUCTION OF CODE.—Section 726 of the Code of Civil Procedure, providing that there shall be but one action to recover any debt secured by mortgage, does not prohibit successive foreclosures for distinct debts secured by the same mortgage when the circumstances render that course proper.

APPEAL from a judgment of the Superior Court of San Joaquin County. Edward I. Jones, Judge.

The facts are stated in the opinion.

Henry E. Monroe, and Edward J. Pringle, for Appellant.

Nicoll & Orr, for Stockton Savings and Loan Society, and for New Defendant to Cross-Complaint, Respondents.

Arthur L. Levinsky, Woods & Levinsky, R. L. Beardslee, W. B. Nutter, W. N. Rutherford, and Gunnison, Booth & Barnett, for Other Defendants, Respondents.

BRITT, C.—On December 7, 1894, the defendants, N. S. Harrold and H. W. Cowell, made to plaintiff their joint and several promissory note for the sum of fifty-six thousand six hundred and eighty-two dollars, and to secure payment thereof Harrold executed to plaintiff a mortgage of certain lands, his individual property, and for the same purpose Cowell also made to the plaintiff a mortgage of lands owned by him in severalty. Plaintiff brought this action to foreclose said mortgages, and joined as a party defendant, among other persons, the appellant McKee, alleging that McKee claims an interest in the said lands subsequent and subject to the liens of said mortgages.

McKee is the creditor of Harrold and Cowell jointly, and also of each of them severally; for his security he holds two mortgages executed by said Harrold, and a series of three mortgages executed by said Cowell; there is no material difference in the legal questions arising in the case upon the two sets of securities, respectively, and it will be convenient, and sufficient for our purposes to give a summary of the transactions and proceedings which immediately concern the mortgages of the defendant Cowell, omitting such as concern more directly those of the defendant Harrold. The said mortgage of Cowell to the plaintiff dated December 7,

1894, covered a tract of land about two thousand two hundred and forty acres in area; on February 15, 1896, Cowell made his promissory note to McKee for the sum of thirty-three thousand dollars, and, to secure payment thereof, he executed to McKee a mortgage of the same date (in which one E. C. Crowell joined as mortgagor) of and upon the said tract of two thousand two hundred and forty acres and also an adjacent tract of, say, four hundred and seventy acres. On May 23, 1896, H. W. Cowell and said Harrold made their joint and several note in favor of McKee for the sum of nine thousand four hundred and ninety-one dollars; and said H. W. Cowell, to secure payment thereof, and also as additional security for his said note of February 15, 1896, executed his several mortgage to McKee upon another body of land containing, it seems, nine hundred and sixty acres, which was entirely distinct from the lands included in the previous mortgage of February 15th. There was a third mortgage from H. W. Cowell to McKee, made July 19, 1897, upon portions of the tract of nine hundred and sixty acres just mentioned, as yet further security for said note of February 15, 1896; the motive for executing this instrument is not clear, for the property covered by it seems to have been already mortgaged for the same debt; it adds nothing to the facts which influence the law of the case, and what is herein said respecting the mortgage of May 23, 1896, treated as security for the note of thirty-three thousand dollars, may be regarded as applying also to said mortgage of July, 1897. The debts evidenced by all the notes aforesaid, together with interest thereon, were due and unpaid at the time the plaintiff commenced this action.

McKee filed a cross-complaint against the plaintiff and against Harrold, Cowell, and other defendants named in the plaintiff's complaint, joining also as defendants in his cross-complaint said E. C. Cowell and one Westbay and one West, who were not parties to the plaintiff's action. In the cross-complaint, McKee set up all his said mortgages, and prayed the foreclosure thereof. Among the averments of his pleading was one that said Westbay and West claim an interest in the land embraced in the mortgage of May 23, 1896, which interest is subject to the lien of that mortgage. On motion of the plaintiff, the court struck out of the cross-

complaint the allegations thereof relating to said mortgage of May 23d, on the ground that the same "do not relate to or depend upon the contract or transaction upon which plaintiff's action was brought, nor do said portions of said cross-complaint affect the property to which said action relates," and that they consist of matter irrelevant to plaintiff's cause of action. Judgment was rendered for the foreclosure of plaintiff's two mortgages, and also McKee's mortgage of February 15, 1896; the judgment required, among other things, the sale of all the land affected by the mortgage last mentioned, and the application of the proceeds realized from the sale of the tract of two thousand two hundred and forty acres first to the payment of the demand secured by plaintiff's mortgage thereon, and the excess, if any, on H. W. Cowell's indebtedness of thirty-three thousand dollars, with interest, etc., to McKee; and that if such excess should be insufficient to pay the amount of such indebtedness to McKee, then that the tract of four hundred and seventy acres be sold in order to raise the balance; and that if a deficiency still remain, McKee shall have judgment against Cowell personally for the amount thereof. The plaintiff is the only party who resisted McKee's attempt to foreclose all his mortgages.

Of the facts thus stated, the point mainly contested is whether the court erred in striking out portions of McKee's cross-complaint, and thus preventing the foreclosure in this action of his mortgage of May 23, 1896, on the tract of nine hundred and sixty acres. The circumstances which render a cross-complaint proper are defined by statute: "Whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may . . . file a cross-complaint." (Code Civ. Proc., sec. 442.) Obviously, the relief sought by McKee does not relate to or depend upon the contracts or transactions—the prior note and mortgages—on which the plaintiff's suit is founded; so that the inquiry becomes whether the relief sought on the mortgage of May 23, 1896, so affects the property to which plaintiff's action relates that such mortgage is the proper subject of foreclosure by cross-complaint.

Cowell's individual note to McKee for the sum of thirty-three thousand dollars was secured, as has been seen: 1. By the mortgage of same date as the note, February 15, 1896, which covered the two thousand two hundred and forty acres of land included in the prior mortgage to plaintiff, and covered also an adjacent tract of four hundred and seventy acres; 2. By the later mortgage of May 23, 1896, on a separate and distinct tract of nine hundred and sixty acres. McKee's right to foreclose on the tract of two thousand two hundred and forty acres, as to which his mortgage of February 15th was a second lien, is admitted; the court below went farther and decreed the foreclosure of that mortgage on the adjacent tract of four hundred and seventy acres as to which it was a first lien; but there the court halted; as the result of its ruling on the motion to strike out parts of McKee's pleading, the tract of nine hundred and sixty acres, on which the same note of thirty-three thousand dollars was secured by the mortgage of May 23d, was left beyond the pale of the judgment. By the law of this state one who proceeds for the recovery of a debt secured by mortgage is required to exhaust the security in one action for the foreclosure of the mortgage (Code Civ. Proc., sec. 726); and it has been held, pursuant to the policy declared by the statute, that when the same debt is secured by two distinct mortgages the foreclosure of but one of these has the effect to waive and nullify the lien of the other. (*Hall v. Arnott*, 80 Cal. 348.) To like effect are *Mascarel v. Raffour*, 51 Cal. 242, and *Commercial Bank v. Kershner*, 120 Cal. 495. So that if the doctrine contended for by the plaintiff is right and the judgment stands, the result must be that McKee can never enforce the lien of his mortgage of May 23d for any part of the debt evidenced by Cowell's note for thirty-three thousand dollars. Moreover, although the court decreed that a judgment for the amount of deficiency should be docketed in favor of McKee against Cowell personally, in case the proceeds of sale of the premises included in the mortgage of February 15th (after first satisfying the mortgage of Cowell to plaintiff) should be insufficient to pay the amount due on the note of thirty-three thousand dollars, with costs, etc., yet it is at least doubtful whether this procedure was regular; for McKee had not exhausted his mortgage security for

that note; in general, the personal liability of a mortgagor is "contingent on the fact that a sale of the mortgaged premises shall fail to satisfy the debt and costs" (*Biddel v. Brizzolara*, 64 Cal. 362); and this, it has been held, means the sale of all the mortgaged premises—the remedy of foreclosure being waived in part, the personal liability of the mortgagor is also waived. (*Bull v. Coe*, 77 Cal. 55; 11 Am. St. Rep. 235; *Woodward v. Brown*, 119 Cal. 283; 63 Am. St. Rep. 108, and cases cited.) It is therefore plain that, if McKee had himself first commenced a suit to foreclose for Cowell's debt of thirty-three thousand dollars, he must have pleaded both the mortgages by which such debt was secured, under penalty of losing all the security not thus claimed; in such an action he would have had the right to bring the Stockton Savings and Loan Society before the court, and the court would have made provision by its decree for the discharge first of the prior mortgage of said society for the proceeds of sale of the tract of two thousand two hundred and forty acres (*Gutzeit v. Pennie*, 97 Cal. 489); McKee's two mortgages for the same debt would have been foreclosed, and thus the court would have administered in such hypothetical action the same relief which McKee claims should have been administered in the case here. So that there is no difficulty inherent in the facts of the case to prevent the court from disposing of both McKee's mortgages in the same judgment which disposes of the mortgages of plaintiff.

Plaintiff urges on sundry grounds that such objects cannot be accomplished by cross-complaint.

1. The effect of section 442 of the Code of Civil Procedure is to require that in cases like the present the relief sought by cross-complaint must be such as affects "the property to which the action relates," viz., the property which is the subject of the action brought by the plaintiff; it is argued hence—although in the face of the practice adopted by the court in decreeing the sale of the parcel of four hundred and seventy acres—that McKee can have no foreclosure on land which plaintiff has not proceeded against. The relief claimed by the cross-complaint in the effort to recover on Cowell's note for thirty-three thousand dollars does not affect the land of Cowell against which plaintiff is proceeding,

such note being secured by a mortgage which is a second lien on that land; the statute does not require that McKee shall abandon part of his security for the same debt—the later mortgage of May 23d—in filing a cross-complaint for the foreclosure of the other part; it has not been enacted that the affirmative relief sought by the cross-complaint shall affect *only* the property to which the plaintiff's action relates. As said of a very similar statute: "The requisite of connection of the defendant's cause of action with the subject of the plaintiff's action is not defined or restricted by the statute. There must only be some connection." (*Metropolitan Trust Co. v. Tonawanda etc. R. R. Co.*, 43 Hun, 521; affirmed, 106 N. Y. 673.) It has been several times held that a defendant may, by cross-complaint or cross-bill, obtain relief affecting land in addition to that involved in the plaintiff's suit, when the cross-complainant's cause of action includes such additional land as well as that with which the plaintiff is concerned. (*Loughridge v. Cawood*, 97 Ky. 533; *Morrison v. Morrison*, 140 Ill. 560; *Phillips v. Anthony*, 47 S. C. 460.)

2. A second objection is that new parties, E. C. Cowell, Westbay, and West, are brought into the action by the cross-complaint in the attempt to foreclose the mortgage of May 23d. This, in itself, is no substantial objection, if the cause of action to which they are made parties defendant is the proper subject of a cross-complaint. (*Mackenzie v. Hodgkin*, 126 Cal. 591, and cases cited; *Loughridge v. Cawood*, *supra*.) The apprehension expressed by plaintiff that said new parties might themselves file a cross-complaint involving the lands affected by Cowell's mortgage of May 23d and yet other lands, and so an "endless continuity" of cross-complaints might occur, is without foundation; there could be no proper cross-complaint which does not in some manner affect "the property to which the action relates," viz., the property which is the subject of the plaintiff's complaint.

3. Reliance is placed on *Brill v. Shively*, 93 Cal. 674. Some language was used in the opinion in that case which from its generality seems to support plaintiff's contention. Brill had held a mortgage on two pieces of land, one of which was subject to a prior mortgage. In an action to foreclose the prior mortgage, Brill had been made a defendant, and

by answer had prayed that any surplus remaining after satisfying the prior mortgage should be paid over to him in virtue of his subsequent mortgage. When Brill came to foreclose his own security, it was claimed in defense that he had already had his one foreclosure in the said former suit, and was barred of any further remedy; but it was considered by the court here that the judgment in the former action concerned only the tract involved in that action, and was no bar to Brill's foreclosure upon the other tract. This was all that was necessary for the disposition of the case, but it was further remarked in the opinion that Brill's mortgage on the tract as to which it was the sole encumbrance "could not be foreclosed in an action brought to foreclose a mortgage upon another and separate piece of land." The remark was just as applied to the circumstances of that case; there could be no foreclosure by a mere answer—a pleading which, under our system, is responsive only to the plaintiff's complaint and regularly is served on nobody but the plaintiff; this court has several times so decided. (*White v. Patton*, 87 Cal. 151; *Hibernia etc. Soc. v. Clarke*, 110 Cal. 27. See, also, *Goodenow v. Ewer*, 16 Cal. 468, 469; 76 Am. Dec. 540.) How widely the relief granted in such cases on the cross-complaint of a mortgagee defendant differs, in its nature and its consequences, from that which may possibly be allowed on his answer, appears from *Black v. Gerichten*, 58 Cal. 56, distinguishing *Frink v. Murphy*, 21 Cal. 108; 81 Am. Dec. 149. Plaintiff cites also *Pauly v. Rogers*, 121 Cal. 294. There the court said that "under the authority of *Brill v. Shively*, *supra*, there could be no such foreclosure under a cross-complaint," referring to an alleged attempt by a mortgagee defendant in a previous action to foreclose his mortgage on land additional to that affected by the original complaint in that action. We understand this observation in *Pauly v. Rogers*, *supra*, to be a statement of what was said in *Brill v. Shively*, *supra*, rather than an affirmation of the dictum as law, for the court proceeded to show that in the case then before it—*Pauly v. Rogers*—the so-called cross-complaint was not such in fact, that it omitted a necessary party, and had been treated by the trial court merely as an answer, and that the former action was not tried or submitted "upon the cross-complaint as a pleading demanding

affirmative relief." Certainly, nothing was decided in either *Brill v. Shively*, or *Pauly v. Rogers*, adverse to the views we entertain of the present case. In our opinion, McKee was entitled to foreclose in this action all his mortgage security for the note of thirty-three thousand dollars.

The status of the security for the note of nine thousand four hundred and ninety-one dollars requires separate consideration. Although that note is included in the mortgage of May 23d with the previous note of February 15th, yet it is a wholly distinct debt—the promise of Harrold and Cowell jointly, while the note of February 15th is the promise of Cowell alone. The mortgage of May 23d, so far as regards the smaller note, is therefore virtually a separate mortgage for the security of that note (see *Tyler v. Yreka Water Co.*, 14 Cal. 212); in that aspect, it certainly does not affect the property to which the plaintiff's action relates; the note of nine thousand four hundred and ninety-one dollars is a cause of action in McKee's favor secured only on the tract of nine hundred and sixty acres, and no sufficient reason appears why it should be allowed any standing for enforcement in this suit. The decree for the sale of the tract of nine hundred and sixty acres to satisfy the note for thirty-three thousand dollars, with interest, etc., should direct that the sale be made of that tract subject to the lien of the mortgage of May 23d for the payment of the said note for nine thousand four hundred and ninety-one dollars, and that McKee be permitted to proceed by independent action against the purchaser and other proper parties to enforce the lien thus saved and reserved in his favor. The power of a court of equity in a proper case to direct a sale of property on foreclosure of a mortgage saving from the effect of the sale of a further lien secured by the same or some other encumbrance is sufficiently established by authority. (*Metropolitan Trust Co. v. Tonawanda etc. R. R. Co.*, *supra*; *Hughes v. Frisby*, 81 Ill. 188; *Poweshiek Co. v. Dennison*, 36 Iowa, 249; *Cox v. Wheeler*, 7 Paige, 248); and the present seems to us to be a proper case for the exercise of the power. Section 726 of the Code of Civil Procedure, providing that there shall be but one action to recover any debt secured by mortgage, does not stand in the way of that course; it

does not prohibit successive foreclosures—when required by the circumstances—for distinct debts secured by the same mortgage. (Compare *McDougal v. Downey*, 45 Cal. 165; *Hunt v. Dohrs*, 39 Cal. 304.) McKee will thus have the full benefit of all his securities, and at the same time plaintiff's action will be kept clear of wholly extraneous controversies as designed by section 442 of the Code of Civil Procedure. In order, however, that the court might make the proper provision by its decree for the sale of the tract of nine hundred and sixty acres subject to the lien of the mortgage of May 23d for the payment of the note of the same date, it was necessary that the cross-complaint contain appropriate allegations regarding that note, and it was error to strike them from the pleading. We may suggest that the cross-complainant have advice of counsel before becoming himself the purchaser of this tract at the sale under the first foreclosure, lest by such purchase he hazard the extinguishment of his remaining lien therein and with it the secured debt. (See *Cox v. Wheeler*, *supra*.) We intimate no opinion whether such result would follow.

It will be understood that the conclusions here announced respecting the Cowell mortgages apply also to the mortgages of Harrold in the like situation. The judgment should be reversed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed. Van Dyke, J., Garoutte, J., Harrison, J.

The statement further shows that the original assessment, certificate of the city engineer, diagram, warrant, and affidavit of demand were offered in evidence together. That they were indorsed:

"2329 assessment for sewerage, etc., First avenue, between Point Lobos avenue and Clement street.

"WM. J. FORD,
"Contractor."

"Recorded this 8th day of May, 1896, in volume 120, page 91.

"THOS. ASHWORTH,
"Superintendent of Public Streets, Highways, and Squares.
"Per John J. Bryan,
"Deputy."

Respondent offered in evidence volume 120, page 91, showing that the assessment, diagram, and warrant were correctly recorded. It further showed that the engineer's certificate was correctly recorded, except that the words "depth being O. K." were not copied and were not of record. We think the recording of the certificate with the other documents required by the statute, with the omission of the words "depth being O. K.," was a substantial compliance with the statute. Their omission from the record did not affect any substantial right of appellant. It is said by Judge Cooley in his work on Taxation, at page 234: "If, however, the defect in a record is obviously clerical, and nothing more, that is to say, if the record on its face sufficiently shows that the proper steps have in fact been taken, but there is some error on the part of recording officer in putting the evidence upon the record in precise conformity to the law, some omission of a word, or the accidental employment of one word for another, or any similar error which cannot mislead, the mistake may be overlooked, and the court, when the record becomes the subject of judicial investigation, may by intendment supply what is omitted and correct what is erroneous, and then sustain the record as though the proper corrections had been made by the recording officer himself."

In *San Francisco v. Certain Real Estate*, 50 Cal. 188, which was an action *in rem* to enforce a street assessment, the duplicate assessment-roll required to be made under section 7 of the act of February 1, 1870, amendatory of the act of March 30, 1868 (Stats. 1869-70, p. 41), did not contain the certificate of the mayor which was appended to the orig-

inal assessment-roll. This omission on the trial was held to be immaterial, and in sustaining the ruling on appeal this court said: "It appears in the record that the original roll was duly made and properly certified by the mayor, who delivered it to the auditor, but, in making the duplicate for the collector, the auditor omitted therefrom the certificate of the mayor. The court below held the omission to be immaterial, and we agree in that opinion."

In *Gillis v. Cleveland*, 87 Cal. 220, the record showed that the warrant was properly signed and countersigned, but that in recording it the name and official designation of the mayor was left out of the record-book. This court held that the law as to recording had been substantially complied with, and that the omitted words were immaterial. So in this case we fail to see how the omitted words could have in any way misled or injured the appellant. They were not a part of the description of the premises, nor of the assessment. In fact, their meaning is not explained in the record; neither is any explanation attempted in appellant's brief. It is claimed that there is no authentication of the record of the engineer's certificate. The transcript shows that page 91 contained a correct copy of the engineer's certificate, with the exception of the omitted words hereinbefore stated. The certificate of recording is as follows: "The foregoing on page 91 is a true and correct record of assessment, diagram, and warrant recorded and issued this 8th day of May, 1896. Thos. Ashworth, Superintendent of Public Streets, Highways, and Squares, per G. H. Oulton, Deputy." The certificate omitted to mention the engineer's certificate, but we think the record shows that it was recorded. The fact of recording, and not the record evidence of the fact, was the main jurisdictional question. When the papers enumerated in the statute, containing the material matters required, were recorded, the amount of the assessment became a lien upon the lot. (*Hellman v. Shoulters*, 114 Cal. 158, and cases cited.)

In *Himmelmann v. Hoadley*, 44 Cal. 225, the record of the assessment, diagram, and warrant covered six pages of the volume of the record. The certificate was as follows: "The foregoing, on page 79, is a true and correct record of the assessment, diagram, and warrant issued this twentieth day of

October, A. D. 1870." It was claimed that the certificate was no authentication of any other part of the book than page 79, and in discussing the point this court said: "It is apparent, we think, that the omission of the numbers of the five preceding pages was a mere clerical error, and that such error was not calculated to mislead a person owning or dealing with a lot mentioned in the assessment."

It is said that the record fails to show that the warrant, assessment, diagram, and certificate were delivered to the contractor before he made demand for payment. Before the contractor has authority to demand payment, these documents must have been recorded and delivered to him. We think the record shows such recording and delivery before demand made. The superintendent of streets certified that the assessment, diagram, and warrant were recorded May 8, 1896. The certified return shows the warrant in proper form, signed by the superintendent of streets and the mayor, dated May 8, 1896. The affidavit of plaintiff on the return shows "that since the date of said warrant, to wit, on the fifth day of June, A. D. 1896, and with and by virtue thereof as such assignee, he went upon each of the lots of land exhibited on the diagram attached to the said assessments," etc.; then follows particulars as to demand. It is therefore, plain from the record that the plaintiff had the assessment, warrant, and diagram in his possession after they were recorded and when demand was made. We cannot indulge in the supposition that they might have been delivered to plaintiff before they were recorded. It appears in the original return that these words are used: "Subscribed and sworn to before me this 6th day of June, A. D. 1896. A. K. Daggett, Notary Public in and for the City and County of San Francisco, State of California." This is marked: "Returned this 6th day of June, 1896, and recorded in volume 120, page 91. Thos. Ashworth, Supt. Public Streets, Highways, and Squares, per John S. Bryan, Deputy." The return as copied in the record is the same as the original, except the word "June" and the figure "6" were left out in the copying, making the record read: "Subscribed and sworn to this 6th day of —, A. D. 189—."

We think, under the authorities cited, that the omission of the words could have injured no one. The material thing to

be done was to make the return in proper form and verify it. This appears to have been done. If it was, in fact, verified properly before being recorded the statute was complied with, and the omission of the copying clerk to fill in the word "June" and the figure "6" in the blank spaces cannot be held to be of such importance as to deprive the contractor of his lien and enable the defendant to escape the payment of his assessment. The assessment contains an item of six dollars and ninety cents for printing, the proportionate part of which would be fifty-seven and one-half cents upon appellant's lot. The appellant claims that the court should have permitted him to show that the "San Francisco Daily Report," in which the notices and resolutions concerning this assessment were published, was not the lowest bidder, and that the publishing was not let to the lowest bidder. We think the ruling of the court was correct. The appellant had no right in this proceeding to have the court turn aside from the question before it, and in a collateral attack determine whether or not the board of supervisors had performed its duty. The fact of due publication gave the jurisdiction to levy the assessment without regard to the paper in which it was published, except the publication must have been made in the paper designated by the council. It was not claimed that the publication was made in a paper different from that designated by the board of supervisors.

The question as to the ownership of the lot as between appellant and defendant Jordan is abandoned in the appellant's reply brief.

The judgment and order should be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Temple, J., McFarland, J., Henshaw, J.

[S. F. No. 1345. Department Two.—February 26, 1900.]

EDWARD R. MOFFITT, Respondent, v. JAMES C. JORDAN et al., Defendants. JOSEPH M. WOOD, Appellant.

STIPULATION—MOTION TO BE RELIEVED—DISCRETION OF COURT.—A motion to be relieved from a stipulation upon the ground that it was entered into through inadvertence, excusable neglect, and mistake of fact, is addressed to the sound discretion of the superior court; and this court will not interfere with the exercise of that discretion in doubtful cases, nor unless it is apparent that the court abused its discretion.

ID.—AGREEMENT TO ABIDE EVENT OF ANOTHER SUIT—FORECLOSURE OF STREET ASSESSMENT—DELAY IN APPLICATION—INSUFFICIENT SHOWING.—It is not an abuse of discretion to refuse to set aside a stipulation agreeing to abide the event of another suit for the foreclosure of a street assessment lien, where the application for relief was not made until after the other case had been decided adversely, and no affidavit of merits was filed at the hearing of the motion, but it was merely shown that since making the stipulation the applicant had discovered that the lot described in the complaint was not the lot described in the assessment, and was not shown that the amount was not due on the assessment, and on the lot therein described, nor that the complaint could not have been amended to obviate the objection.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Edward A. Belcher, Judge.

The facts are stated in the opinion.

Joseph M. Wood, Appellant *in pro. per.*

J. C. Bates, for Respondent.

COOPER, C.—This is an appeal from a final judgment, and the sole question sought to be reviewed here is an order of the lower court refusing to relieve the appellant from a written stipulation. It appears that in May, 1897, the plaintiff had brought two actions in the superior court of the city and county of San Francisco to recover and foreclose street assessment liens upon two different lots owned by appellant and included in the same assessment, said actions being numbered 58,614 and 58,615, respectively.

On the twenty-first day of May, 1897, the attorney for respondent, at the request of the attorney for appellant, entered into a stipulation, of which the following is a copy:

"It is hereby stipulated by and between the parties hereto that said action No. 58,615 abide the final determination and judgment rendered in the case of *Edward R. Moffitt v. James C. Jordan et al.*, defendants, No. 58,614, now pending in the said superior court of the city and county of San Francisco. This stipulation need not be filed. Dated May 21, 1897.

"J. C. BATES,

"Attorney for Plaintiff.

"J. M. WOOD,

"Defendant in Proper Person."

Afterward, on the eighth day of October, 1897, the superior court rendered judgment in said action No. 58,614 in favor of the respondent and against the appellant, which judgment was duly entered, and which has this day been affirmed by this court, S. F. No. 1344. On November 12, 1897, the appellant made a motion to be relieved from the stipulation upon the ground that he entered into it through inadvertence, excusable neglect, and mistake of fact. The court, after hearing the affidavit of appellant and the counter-affidavit of respondent, denied the motion. Motions of this kind rest very much in the sound discretion of the court below. That discretion is usually exercised liberally and in furtherance of justice. The court, being made acquainted with all the reasons, will, if the inadvertence is wholly inexcusable, or if it arises from negligence, not look upon it kindly. (*Shearman v. Jorgensen*, 106 Cal. 485.) This court will not interfere in doubtful cases, nor unless it is apparent that the court abused its discretion. (*Robinson v. Exempt Fire Co.*, 103 Cal. 6; 42 Am. St. Rep. 93.) In this case we do not think there was such abuse of discretion as would authorize us to set aside the order. The application was not made until after the case, No. 58,614, had been decided against the appellant. Nearly six months had elapsed after the stipulation was signed before the motion was made. There was no affidavit of merits filed with the application or at the hearing. The affidavit of appellant claimed that since making the stipulation he had discovered that the lot described

in the complaint was not the lot described in the assessment, but he did not allege or show that the amount was not due upon the assessment and on the lot therein described. He stated that the lot described in the assessment was described as per a diagram incorporated in his affidavit. The affidavit on behalf of respondent denies that appellant's affidavit and diagram contains a correct description of the lot assessed, and alleges that it omits a material and essential part thereof. Conceding that the description in the complaint was erroneous, it is not shown that respondent could not have amended his complaint to obviate the objection.

The judgment and order should be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Temple, J., McFarland, J., Henshaw, J.

[Sac. No. 599. Department One.—February 26, 1900.]

A. F. BROWN, Respondent, v. VALLEY VIEW MINING COMPANY, Appellant.

PLEADING—SUPPLEMENTAL COMPLAINT—AID OF ORIGINAL CASE.—The facts to be alleged in a supplemental complaint must relate to and be material to the original case stated in the complaint.

ID.—NEW CAUSE OF ACTION—IMMATERIAL ISSUES.—If a supplemental complaint merely sets forth a new distinct cause of action, independent of that stated in the original complaint, it is improperly filed, and cannot be considered; and it is immaterial whether the issues therein raised are supported by evidence or not.

ID.—COMPLAINT FOR SERVICES—SUPPLEMENTAL PLEADING OF DIFFERENT CONTRACT—FINDINGS.—Where an original complaint for services was based upon an express contract for the payment of a specified sum for services performed, and did not allege or show that any contract was made to pay by the month at any rate of wages, a supplemental complaint, setting up a monthly employment under which services were rendered before and after the commencement of the action, sets forth a distinct and independent cause of action; and findings based thereupon are outside of the issues presented by the complaint, and are not in harmony therewith.

ACTION FOR SERVICES AGAINST CORPORATION—FINDING AGAINST EVIDENCE

—EMPLOYMENT BY STOCKHOLDERS PERSONALLY.—In an action against a corporation for services rendered therefor, at its request, a finding that the plaintiff was employed by the corporation is against the evidence, where it appears without conflict that the employment of plaintiff was made by two of the shareholders of the corporation personally, acting in their own behalf, and not for the corporation, and that they were not entitled to charge the corporation therefor, if they had performed the services personally.

APPEAL from a judgment of the Superior Court of Placer County and from an order denying a new trial. **J. E. Prewett**, Judge.

The facts are stated in the opinion of the court.

John M. Fulweiler, for Appellant.

The stockholders could only bind themselves, and could not bind the corporation. (*Richardson v. Scott River etc. Co.*, 22 Cal. 150; *Love v. Sierra etc. Co.*, 32 Cal. 639; 91 Am. Dec. 602; *Gashwiler v. Willis*, 33 Cal. 11; 91 Am. Dec. 607; *Chamberlain v. Pacific Wool etc. Co.*, 54 Cal. 103; *Wright v. Oroville etc. Co.*, 40 Cal. 20; Boone on Corporations, secs. 41, 44; *Wickersham v. Crittenden*, 93 Cal. 17.) A new cause of action cannot be set up by supplemental complaint. (*Gleason v. Gleason*, 54 Cal. 135; *Wattson v. Thibou*, 17 Abb. Pr. 184; *Cordier v. Cordier*, 26 How. Pr. 187.)

C. Kennedy, and **L. L. Chamberlain**, for Respondent.

The supplemental complaint properly alleged facts material to the case occurring after the former complaint. (Code Civ. Proc., sec. 464.) It was in the discretion of the court to allow it to be filed. (*Harding v. Minear*, 54 Cal. 502; *Gleason v. Gleason*, 54 Cal. 135; *Jacob v. Lorenz*, 98 Cal. 337.) It is no objection to a supplemental complaint that different or additional relief is asked. (*Baker v. Bartol*, 6 Cal. 483; *Jacob v. Lorenz*, *supra*; *Roush v. Fort*, 3 Mont. 182.) Benton acted in a double capacity, and his action bound the corporation. There is testimony that he acted as agent of the corporation, sufficient to sustain the finding, notwithstanding the evidence may be conflicting. The formal action of the

directors was not necessary to bind the corporation. (*McKiernan v. Lenzen*, 56 Cal. 61; *Greig v. Riordan*, 99 Cal. 322.) The corporation received the benefit of the services and should pay for them. (*Pauly v. Pauly*, 107 Cal. 8; 48 Am. St. Rep. 98.) A corporation cannot set up its own laches to avoid its debts, any more than can a natural person. (7 Am. & Eng. Ency. of Law, new ed., 761, note 1.)

VAN DYKE, J.—The complaint, which was filed October 11, 1895, after alleging that the defendant was and is a corporation, states “that within two years last past, at the express request of and hiring by defendant, at the county of Placer, plaintiff performed work and labor for defendant. That defendant agreed to pay therefor the sum of four hundred and eighty dollars.” That defendant has not paid the same, nor any part thereof, although requested, and asks judgment for said sum of four hundred and eighty dollars. The answer admits the incorporation of defendant, but denies the employment of plaintiff by defendant, or that it agreed to pay the plaintiff, or that any sum is due the plaintiff from said defendant.

There is also a so-called supplemental complaint in the judgment-roll, and when and how that was filed appears toward the close of the statement on motion for a new trial, as follows: “This was all the testimony offered or introduced by either party and at the close of the testimony plaintiff asked leave of the court to file an amendment to the complaint as a supplemental complaint. To this the defendant then and there objected, but the court then and there overruled the said objection to filing the amended or supplemental complaint, and allowed plaintiff leave to file the same to which ruling defendant then and there excepted; and thereafter plaintiff filed the following supplemental complaint, which by stipulation was deemed denied, to wit” (then follows the supplemental complaint.)

It is alleged in the supplemental complaint that since the filing of the original complaint the plaintiff continued in the employ of the defendant “under the express request and hiring by defendant, as set forth in the original complaint, for and during a continuous period of twenty-two months, since October 11, 1895; that defendant agreed to pay therefor the sum of twenty dollars per month, aggregating the sum

of four hundred and forty dollars"; that the same had not been paid, and praying for judgment for this additional sum of four hundred and forty dollars.

Judgment was awarded to the plaintiff in the sum of nine hundred and twenty dollars, being the aggregate of the sums claimed in the original and supplemental complaints respectively. This appeal is taken from the judgment and the order denying defendant's motion for a new trial.

1. The contention of the appellant that the court erred in allowing respondent to file the supplemental complaint in this case is well taken and must be sustained. The authorities relied upon by respondent do not support him. "The plaintiff and defendant, respectively, may be allowed on motion to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer." (Code Civ. Proc., sec. 464.)

The facts to be alleged in the amended or supplemental pleading must relate to and be material to the original case. (*Gleason v. Gleason*, 54 Cal. 135.) As appears from the allegations in the original complaint, the action was founded upon an express contract to pay the sum of four hundred and eighty dollars for a certain period of services. There is nothing said in the original complaint in reference to employment by the month, or how much the plaintiff should be paid per month. The action counts upon an entire, express contract for a fixed price, and this was a cause of action distinct and independent from the alleged cause of action in the so-called supplemental complaint.

Respondent refers to and relies upon *Jacob v. Lorenz*, 98 Cal. 332. That was a proceeding to enjoin the defendant from injuring or washing away a certain water ditch. On the coming in of the answer, it appeared therefrom that the defendant had already washed away a portion of the ditch since the commencement of the action, and thereupon the plaintiff, by leave of court, filed a supplemental complaint alleging the facts stated in said answer, and that the same was done wrongfully and maliciously, with intention to destroy said ditch.

In its opinion, speaking in reference to the discretion of the court to allow supplemental pleadings, this court says:

"This discretion, however, is not an arbitrary one. In *Gleason v. Gleason*, *supra*, it was said that, as a general rule, the right to file a supplemental complaint can be exercised only with reference to matters which may be consistent with and in aid of the case made by the original complaint, and it is not allowable to substitute a new and independent cause of action by way of supplemental complaint." And, further: "The subject of the action was plaintiff's property and his right to convey water in his ditch across defendant's line. That right was not destroyed, and was still the subject of litigation. Damages for the injury to that property—the ditch—was incident to that right and consistent with it. It was not an 'independent cause of action.'" *Harding v. Minear*, 54 Cal. 502, another case cited by respondent, was where an attachment had been issued and the property of defendant seized under a writ of attachment at the commencement of the action, and the property thereafter released from the attachment upon giving an undertaking with sureties, as required by the code. Afterward, the defendant, having received his certificate of discharge in bankruptcy, applied to the court to file a supplemental answer setting up his discharge in bar of the action. This the court refused to allow. It was held by this court that under the circumstances it was not an abuse of discretion on the part of the trial court, for the reason, among others, that the plaintiff in the action had by his diligence obtained an attachment lien on the property of defendant four months before he commenced his proceedings in bankruptcy, and, according to the provisions of the bankruptcy law, the attachment was not dissolved by the discharge of the defendant; the only effect of the discharge was to limit the judgment recoverable in the attachment suit. The plaintiff was entitled to at least a judgment for the enforcement of his attachment lien.

2. The court finds "that all the averments of the complaint and supplemental complaint are true." All the averments of the supplemental complaint are deemed denied, and there is nothing in the record to show that there was any testimony whatever introduced to support the allegations of the supplemental complaint. Before that was filed all the testimony had been introduced, and that related en-

tirely to the first cause of action set forth in the original complaint. And there appears to be no stipulation or agreement that such testimony should apply to or be considered in reference to the second cause of action. But, inasmuch as the supplemental complaint setting forth a distinct cause of action was improperly filed and cannot be considered, it is immaterial whether issues therein raised were supported by evidence or not.

3. The court also finds that the plaintiff was employed by the defendant at the agreed price of twenty dollars per month from September 14, 1893, to July 14, 1897. It already appears that the original complaint is based upon an express contract for the payment of four hundred and eighty dollars, for services performed, and does not allege or show that any contract was made to pay by the month at any rate of wages. This finding, therefore, does not correspond with the averments of the complaint, or respond to the issues raised by the answer thereto. Further than this the evidence does not support the finding that the plaintiff was employed by defendant corporation. The plaintiff himself testifies: "Mr. Benton employed me to work, and I never was discharged up to this time." He introduced in support of his evidence the following letter:

"San Francisco, Cal., May, 1893.

"Mr. A. F. Brown, Keeper Valley View Mine.

"Dear Sir: This will introduce Messrs. S. M. Briggs and J. Ramsdell, to whom we have leased the mine. You will turn all the property over to them.

"Mr. Brown, we are well pleased with your services, and hope, should we be obliged to, that we can call upon you again at some future time.

Yours truly,
 "D. E. ALLISON,
 "C. L. BENTON,
 "By Benton."

On cross-examination, plaintiff admitted that he received payments from Benton on May 10, 1893, and receipted to Benton in full for all demands. The plaintiff further testified "that he had never seen Mr. Allison, but had always dealt with Mr. Benton, and wrote to him." Further: "That he did not know Mr. Benton was connected with the defendant company. He was employed by Mr. Benton and

had corresponded with him, and received what money was paid from Mr. Benton." Mr. Benton was called as a witness on behalf of the plaintiff, and testified that he employed Mr. Brown as watchman on the Valley View mine some time in October, 1892. "That he was not the superintendent or agent of the Valley View Mining Company, and had not employed Mr. Brown for the company, or as the superintendent or agent of the company. . . . That he had employed Mr. Brown to act as watchman on his own behalf, as also on behalf of Mr. Allison, as they were more interested as stockholders in the company than anyone else, and they desired to preserve the property from destruction." That he had discharged Mr. Brown in May, 1893, and paid him in full for his services, as shown by the check to and receipt of Brown. He further testified that the parties with whom he had made the agreement and bond of March 21, 1893, introduced by the plaintiff, took possession of the mine, and from that time afterward he had not employed Mr. Brown, either for himself or for anyone, and did not know that he, Brown, was there claiming to work as watchman. That all the time after May, 1893, the parties with whom he made those agreements, and other parties for them, were in charge of the work and looking out for the mine, and not Mr. Brown. That the directors of the Valley View Mining Company held two meetings in the spring of 1892, and in June two of the directors resigned, leaving only three directors, and there had been no election of directors to fill the vacancy of those who resigned, or meeting of the other directors or stockholders of said company until late in the fall of 1897. Mr. Benton also testified that he never claimed at any time to be acting as agent or superintendent of the Valley View Mining Company, and that he and Mr. Allison, as codirectors, paid Brown for his services as watchman employed by him. That it was for his own interest and that of Allison as stockholders.

The corporate powers and business of all corporations of the class to which the defendant belongs must be exercised, conducted, and controlled by a board of not less than five directors, and whenever a vacancy occurs in the office of director, unless the by-laws of the corporation otherwise provide, such vacancy must be filled by an appointee of the board; unless a majority or quorum of the directors is pres-

ent and acting, no business performed or act done is valid as against the corporation, except for the purpose of filling vacancies in the board. (Code Civ. Proc., secs. 305, 308.)

It appears from the uncontradicted evidence in this case that the board of directors of the defendant corporation consisted of five, and that from the spring of 1892 to the fall of 1897 there were two vacancies in such board. That these vacancies were not filled during that period, and no meeting of the board of directors was held for the transaction of any business of the corporation.

It further appears by the testimony introduced by the plaintiff that he was employed by Mr. Benton, for himself and Mr. Allison, and not by the corporation. There is no ground, therefore, for a presumption or implication that the employment was at the instance or request of the defendant corporation. Neither Mr. Benton nor Mr. Allison were entitled to any compensation from the company for any services performed by them in looking out for the mine; for doing this they were but attending to their own interests as stockholders in the company. "A director in a corporation is not entitled to compensation for his services as director in the absence of any agreement in advance that he shall receive such compensation." (*Wickersham v. Crittenden*, 93 Cal. 17-32.)

If Benton himself could not charge the corporation for such services performed by himself, a substitute he might employ would be in no better position.

The evidence in the case does not support the findings or justify the judgment against the defendant corporation.

The judgment and order denying a new trial are reversed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1303. Department One.—February 26, 1900.]

UNION PAVING AND CONTRACTING COMPANY,
Appellant, v. JOHN McGOVERN et al., Respondents.

STREET IMPROVEMENT—PROTEST OF OWNERS OF MAJORITY OF FRONTAGE—JURISDICTION OF SUPERVISORS—CASE AFFIRMED.—The protest of the owners of the majority of frontage upon a proposed street improvement, delivered to the clerk of the board of supervisors of the city and county of San Francisco, within proper time, not only operates to suspend the jurisdiction of the board to proceed with the improvement for the period of six months, but also precludes the further ordering of the work to be done without the passage of a new resolution of intention therefor; and no lien can be created by an assessment for the work without such new resolution.

ID.—AGREEMENT OF PROPERTY OWNERS—ASSIGNMENT OF CONTRACTS—PROPORTIONAL ASSESSMENT UNDER ORIGINAL CONTRACT—ESTOPPEL. The agreement by certain property owners to obtain a contract for the proposed work in front of their lots at a reduced rate, and to assign the same to one who agreed to do the work for them at that rate, to be paid "on completion of said work," without any agreement by them to pay any assessment under the original contract, and without any representation by them as to its validity, does not estop them from disputing the validity of a proportional assessment in favor of an assignee of the original contract, who was also an assignee of the contract of the owners, for work done under the original contract, in the completion of two blocks out of six included therein.

ID.—FORECLOSURE OF STREET ASSESSMENT—STATUTORY PROCEEDINGS—ESTOPPEL IN PAYS INAPPLICABLE.—In an action to foreclose a street assessment, the lien of which exists only by virtue of a strict compliance with the provisions of the statute, and the proceedings in which are purely statutory, and without the enforcement of any personal liability, the doctrine of estoppel *in pays* has no application.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

D. H. Whittemore, for Appellant.

Alexander G. Eells, for Respondents.

HARRISON, J.—Action upon a street assessment.

1. Within ten days after the publication and posting of the notice of the improvement, the owners of a majority of the frontage upon the work delivered to the clerk of the board of supervisors written objections to the same. No further steps were taken until the expiration of six months, when the board of supervisors ordered the work to be done without again passing a resolution of intention therefor. Under the rule declared in *City Street Imp. Co. v. Babcock*, 123 Cal. 205, the proceedings in relation to doing the work were without authority, and no lien was created by the assessment therefor.

2. After the contract had been awarded, certain owners of property fronting upon the work, including the respondent McGovern, entered into an agreement November 14, 1895, with one S. E. Tucker, by which the property owners agreed that they would elect to do the work and enter into a written contract therefor with the superintendent of streets at the prices at which it had been awarded, and would assign and transfer said contract to Tucker in consideration that he would perform said work "as to them" at certain prices—less than those at which the work had been awarded—and Tucker agreed that he would perform said work for them at said prices. Contemporaneously with the signing of this agreement, and as a part of the same transaction, McGovern and the other property owners entered into a property owners' contract with the superintendent of streets for doing the work ordered by the board, and assigned the same to Tucker. By virtue of several assignments of this contract, the plaintiff became the owner thereof, March 4, 1896. The work provided for in the contract included six blocks, and on July 20, 1896, it having been shown to the board of supervisors that two blocks had been completed, that body directed the superintendent of streets to make and issue a "proportional assessment" on these blocks for the work then done. Under this order the assessment on which this action is brought was issued August 3, 1896.

It is contended by the appellant that by virtue of these facts McGovern is estopped from questioning the validity of the contract and assessment. We are unable, however, to accede to this proposition. In an action to foreclose a lien

upon land for the cost of a public improvement, in which there is no personal liability, and where the proceedings are purely statutory, and the lien exists only by virtue of a strict compliance with the provisions of the statute, the doctrine of estoppel *in pais* has no application. (*Heft v. Payne*, 97 Cal. 108.)

The agreement between the property owners and Tucker, and their entering into the contract with the superintendent of streets, and its assignment to Tucker is found by the court to have been "a part of the same transaction."

The agreement on their part with Tucker was that if he would perform the work specified in their contract with him they would pay him therefor the prices named in their agreement "on completion of said work"; and he agreed to do the work named in their contract with the superintendent at the price named in their contract with him. The reference to the public contract was only for identification of the work to be performed by Tucker. There was no agreement on his part to perform any of the terms of their contract with the superintendent of streets, or on their part to pay any assessment that might be made by virtue of that contract. It does not appear that the work has yet been completed, or that any more has been done than that covered by the assessment, and, as there was no agreement on their part to pay any assessment that might be made for the work, they are not estopped from disputing the validity of the assessment sued upon.

Callender v. Patterson, 66 Cal. 356, cited by appellant, is inapplicable. In that case the property owners had entered into the contract and completed the work, and received an assessment therefor which purported to be a charge upon their lands, and more than a year thereafter they assigned the same to the plaintiff "for value." It was upon these facts that the court held them to be estopped from questioning the validity of the assessment. In the agreement between Tucker and the property owners they do not purport to assign to him an assessment for work that had been already done for them, or any existing obligation in their favor from which a warranty of its validity might be implied. They merely agreed to assign a contract not yet entered into, and which at that time, and also at the time of its assignment, was wholly executory, and Tucker must be

assumed to have determined the value and validity thereof for himself. The contract which was the subject of their negotiations was of a public nature, and all the proceedings in reference thereto were evidenced by public records open to the inspection of all, and from which Tucker had the same opportunity for ascertaining the validity of the contract as did the defendants. The court finds that the defendants made no representation of any kind to Tucker or to the plaintiff to the effect that the contract, or that the proceedings therefore, were regular or sufficient or valid, and it also finds that they did not themselves know of any defect in said proceedings until after the commencement of this suit.

The want of evidence in support of the finding that McGovern signed the documents at the request of Tucker is immaterial, as the judgment must have been the same irrespective of this finding.

The judgment and order denying a new trial are affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1003. Department One.—February 27, 1900.]

J. N. WILLIAMS, Appellant, v. H. B. GASTON et al., Respondents.

FORECLOSURE OF MORTGAGE—MECHANICS' LIENS—ATTORNEYS' FEES UPON APPEAL—JURISDICTION OF SUPERIOR COURT.—Upon appeal from a judgment in an action to foreclose a mortgage, rendered in favor of certain defendants directing the payment of mechanics' liens claimed by them out of the proceeds of sale prior to the payment of plaintiff's mortgage, the appellate court will not pass upon the question of the allowance of attorney's fees for defending against the appeal by the plaintiff, but application for any further proper allowance for reasonable attorney's fees in the supreme court, under section 1195 of the Code of Civil Procedure, must be made to the superior court, which has jurisdiction to determine that question.

APPEAL from a judgment of the Superior Court of Alameda County. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

William H. Chapman, for Appellant.

W. H. O'Brien, for H. B. Gaston and Lucia E. Gaston, Respondents.

C. L. Colvin, for Pacific Lumber Company, Respondent.

F. W. Sawyer, for James Dayton, Respondent.

J. B. Richardson, and L. D. Manning, for J. L. Barker, Respondent.

C. T. Johns, for Al. Wood and Charles N. Wood, Respondents.

THE COURT.—In an action for the foreclosure of a mortgage, judgment was rendered in favor of certain defendants for the amount of certain mechanics' liens claimed by them, and directing their payment out of the proceeds of the sale prior to the payment of the plaintiff's mortgage. At the hearing of the appeal the appellant consented to an affirmance of the judgment, and thereupon one of the respondents asked that he be allowed an attorney's fee for defending against the appeal.

In *Schallert-Ganahl etc. Co. v. Neal*, 94 Cal. 192, it was held that the provision of section 1195 of the Code of Civil Procedure, authorizing the court to allow "reasonable attorneys' fees in the superior and supreme courts" is addressed to the superior court, and that that court has the power to allow to the successful party such fee for services in this court. In the present case, that court did make an allowance to each of the respondents for "attorneys' fees" without indicating that it intended to limit such allowance for services in the superior court. If, for any reason, a further allowance is proper, application therefor should be made to that court, where the propriety of the allowance, as well as the amount to be allowed, can be more readily determined.

The judgment is affirmed.

[Sac. No. 592. Department One.—February 27, 1900.]

GEORGE C. BREWER, Respondent, v. HORST AND
LACHMUND COMPANY, Appellant.

**SALE OF PERSONAL PROPERTY—STATUTE OF FRAUDS—MEMORANDUM—
TELEGRAMS—FIGURES AND ABBREVIATIONS—INTERPRETATION.**—Upon
a sale of personal property within the statute of frauds, where the
memorandum of agreement consisted of telegrams bearing the same
date, and containing symbolic figures and abbreviated terms, they
should not only be read together, for the purpose of determining
their sufficiency, but the court is permitted to interpret the terms
used therein by the light of all the circumstances under which they
were sent and received, and in the light of all the knowledge of the
meaning of the terms which the parties to the transaction had at
the time, and, if it can thus be plainly seen from the proper under-
standing of the telegrams who were the parties to the contract,
and what were its subject matter and terms, the memorandum should
be held sufficient.

ID.—ADMISSIBILITY OF PAROL EVIDENCE.—Parol evidence is admissible
in such case to explain all of the circumstances surrounding the
parties, to show in what sense the figures and abbreviated terms
were used and understood by the parties, and to connect the descrip-
tion of the subject matter with the thing intended.

APPEAL from a judgment of the Superior Court of the
County of Sacramento. Matt. F. Johnson, Judge.

The facts are stated in the opinion.

White & Seymour, for Appellant.

The memorandum is insufficient, as it does not mention
the subject matter, price, and terms of the contract, and these
cannot be supplied by parol. (Benjamin on Sales, sec. 250,
and note t; Browne on Statute of Frauds, secs. 371, 385; 1
Reed on Statute of Frauds, sec. 322; *Eppich v. Clifford*, 6
Colo. 493; *First Baptist Church v. Bigelow*, 16 Wend. 28;
Williams v. Morris, 95 U. S. 456; *Wright v. Weeks*, 25 N. Y.
153; *May v. Ward*, 134 Mass. 127; *Pulse v. Miller*, 81 Ind.
190; *Holmes v. Evans*, 48 Miss. 247; 12 Am. Rep. 372;
Hyde v. Cooper, 13 Rich. Eq. 250; *Whelan v. Sullivan*, 102
Mass. 206; *Waterman v. Meigs*, 4 Cush. 497; *Sheid v.*
Stamps, 2 Sneed, 175; *Washington Ice Co. v. Webster*, 62
Me. 341; 16 Am. Rep. 462.)

Albert M. Johnson, for Respondent.

The telegrams are so connected that they fairly constitute one paper, and must be taken together. (1 Beach on Contracts, sec. 575; *Ryan v. United States*, 136 U. S. 83; *Lee v. Mahoney*, 9 Iowa, 344; *Jelks v. Barrett*, 52 Miss. 315; *Fisher v. Kuhn*, 54 Miss. 480; *Breckinridge v. Crocker*, 78 Cal. 529; *Joseph v. Holt*, 37 Cal. 250; *Beckwith v. Talbot*, 95 U. S. 289.) Parol evidence is admissible to explain the trade terms used, to identify the subject matter, and to show the situation of the parties. (Beach on Contracts, sec. 581; Brown on Parol Evidence, sec. 10, p. 179; Wood on Statute of Frauds, secs. 364, 385, 395-97; *Stoops v. Smith*, 100 Mass. 63; 97 Am. Dec. 76; 1 Am. Rep. 85; *Hart v. Hammett*, 18 Vt. 127; *Callahan v. Stanley*, 57 Cal. 476; *Berry v. Kowalsky*, 95 Cal. 134; 29 Am. St. Rep. 101; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446; *New England Dressed Meat etc. Co. v. Standard Worsted Co.*, 165 Mass. 328; 52 Am. St. Rep. 516.)

GRAY, C.—This is an action for a breach of contract of sale and purchase brought by the vendor against the vendee. The complaint sets out an agreement whereby plaintiff agreed to sell, and defendant agreed to buy, of plaintiff fifty-seven thousand one hundred and ten pounds of hops at eleven and five-eighths cents per pound; that plaintiff tendered the hops and defendant refused to take or pay for them, and that thereupon plaintiff sold said hops to a third person for the best obtainable price, which was eight hundred and thirty dollars and ninety-three cents less than defendant had agreed to pay therefor. Plaintiff obtained judgment for said eight hundred and thirty dollars and ninety-three cents, and defendant appeals. The case comes here on the judgment-roll.

The answer sets up the statute of frauds, alleging that the agreement sued on "was an agreement for the sale of goods and chattels at a price exceeding two hundred dollars; and defendant did not accept or receive any part of said goods and chattels, and did not pay any part of the purchase money therefor; and said sale was not made at auction; and said agreement was not, nor was any sufficient, proper, or adequate memorandum or note thereof, in writing, subscribed by defendant, or by any agent of defendant."

The court found as to the contract that Fred E. Alter was the general agent in the state of California and was empowered to make contracts therein for defendant. That C. A. Wagner was defendant's agent in the county of Sacramento, empowered to solicit samples in that and adjoining counties from hopgrowers and transmit the same to defendant's said general agent at Santa Rosa, California, "and to contract with such growers for the purchase from them in behalf of defendant corporation of such of said hops as might by the latter be desired, subject to the approval of the defendant corporation, through its general agent said Alter." That plaintiff was a hopgrower, having a farm near Ben Ali, Sacramento county, and in September, 1897, said Wagner, as agent for defendant, obtained samples of a certain lot of hops, consisting of two hundred and ninety-six bales, weighing fifty-seven thousand one hundred and ten pounds, belonging to said plaintiff, and transmitted said samples to Alter at Santa Rosa, at the same time informing said Alter of the fact that said samples were from the lot aforesaid comprising two hundred and ninety-six bales of the last pickings of hops grown by plaintiff during the year 1897 upon his said farm; that at the same time said Wagner designated said samples by the trade number or symbol "13"; that it was and is the custom which prevails generally among dealers in hops to mark and designate by number the different samples furnished them by growers, and such custom was followed by defendant in the transaction herein set forth. That hops are sold, according to the custom of trade and usage in California, by the pound. That on October 11, 1897, plaintiff and defendant's agent, Wagner, entered into an oral contract, subject to the approval of Alter, whereby plaintiff sold and defendant bought the aforesaid lot of hops, provided the same were in quality equal to the samples marked "13," and it was agreed that defendant should inspect the hops on or before October 16th. On the same day, October 11th, Wagner telegraphed to Santa Rosa as follows:

"October 11, 1897.

"Horst & Lachmund Co., Santa Rosa, Cal.

"Bought thirteen at eleven five-eighths net you; confirm purchase by wire to Brewer, nineteen sixteen M street, inspection on or before Saturday. Do you want fifteen at eleven quarter?"

C. A. WAGNER."

Alter received this message the same day, and thereupon sent to plaintiff, and plaintiff received, the following telegram:

p. seller "Santa Rosa, Cala., Oct. 11-97.
"Geo. Brewer, 1916 M street, Sacramento, Cala.

"We confirm purchase Wagner eleven five-eighth cents, like sample.

"(Signed) HORST AND LACHMUND CO."

That these telegrams are the only written evidence of the contract between the parties. That the said Alter knew that the number or symbol designated "13," used in the telegram first set out above, referred to and meant the hops belonging to plaintiff, as aforesaid, comprising said two hundred and ninety-six bales or thereabouts, and were the last pickings of plaintiff's hops grown upon his said farm in 1897, and also knew the situation of the hops and the other facts hereinbefore mentioned. And that defendant subsequently inspected the hops, and, without any lawful or just cause, rejected them and refused to receive them when tendered by plaintiff.

The only question presented for decision is, Did these telegrams constitute a sufficient note or memorandum of the contract to satisfy the requirements of the statute of frauds? The trial court, by its judgment, answered this question in the affirmative. And, in view of all the facts found, we think the court reached the proper conclusion. If there were nothing to look to but the telegrams, the court might find it difficult, if not impossible, to determine the nature of the contract, or that any contract was entered into between the parties. But the court is permitted to interpret the memorandum (consisting of the two telegrams) by the light of all the circumstances under which it was made; and if, when the court is put into possession of all the knowledge which the parties to the transaction had at the time, it can be plainly seen from the memorandum who the parties to the contract were, what the subject of the contract was, and what were its terms, then the court should not hesitate to hold the memorandum sufficient. Oral evidence may be received to show in what sense figures or abbreviations were used; and their meaning may be explained as it was understood between the parties. (*Mann v. Higgins*, 83 Cal. 66; *Berry v. Kowalsky*, 95 Cal. 134; 29 Am. St. Rep. 101; *Callahan v. Stanley*, 57 Cal. 476.)

Also: "Parol evidence is always admissible to explain the surrounding circumstances, and situation and relations of the parties, at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject matter, and to explain all terms and phrases used in a local or special sense." (*Preble v. Abrahams*, 88 Cal. 245; *Towle v. Carmelo etc. Co.*, 99 Cal. 397.) Interpreting the telegrams by the foregoing rules, it is not difficult to see that the parties to the contract are George Brewer, of 1916 M street, Sacramento, California, vendor, and Horst and Lachmund Company, of Santa Rosa, California, vendee; that the contract was one of purchase and sale, and the subject of it was the property represented in the first telegram by "thirteen" and well known by the parties to consist of two hundred and ninety-six bales of hops, and to be the last pickings of hops grown by plaintiff upon his farm in Sacramento county during the year 1897, and that the price to be paid for said hops was eleven and five-eighths cents per pound.

The two telegrams bear the same date; on their face the last one was sent to plaintiff in response to the first; and it is clear that they should be read together to determine whether they constitute the note or memorandum required by the statute of frauds. (*Elbert v. Los Angeles Gas Co.*, 97 Cal. 244; *Breckinridge v. Crocker*, 78 Cal. 529.) We are satisfied that the telegrams, thus read by the light of the circumstances surrounding the parties, are sufficient to take the contract out of the statute of frauds. Any other conclusion than the one here reached would certainly impair the usefulness of modern appliances to modern business, tend to hamper trade, and increase the expense thereof.

We advise that the judgment be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Garoutte, J., Van Dyke, J., Harrison, J.

[S. F. No. 1191. Department Two.—February 27, 1900.]

JOHN W. FLINN, Appellant, v. EVELYN P. FERRY, Respondent.

REPLEVIN—CHATTEL MORTGAGE—STIPULATION FOR POSSESSION.—A stipulation in a chattel mortgage expressly giving the mortgagee a right of possession upon default of the mortgagor in the payment of the note or the interest is valid; and the mortgagor or his assignee, upon such default, is entitled to maintain replevin for the mortgaged property.

ID.—MATURITY OF NOTE AND MORTGAGE BEFORE TRIAL—RETURN OF REPLEVIED PROPERTY NOT REQUIRED—COSTS.—Where the note and the mortgage containing such stipulation for right of possession became mature before the trial, even if the defendant was entitled to the possession of the replevied property at the commencement of the action, the court should not decree the return thereof to the defendant at the trial, merely that it might again be replevied by the plaintiff, but should leave the possession of the property where it belongs, and give the defendant judgment for costs only.

ID.—PLEADING—AIDER OF COMPLAINT BY ANSWER.—Where the complaint alleged that plaintiff was in possession of the property and entitled thereto on the day before the commencement of the action, and that defendant then wrongfully took possession of the property, and refused to return it upon demand, any defect therein is aided and cured by the answer taking issue upon plaintiff's right of possession on the day named, or at any other time, and affirmatively averring that defendant is and at all of the times herein mentioned was the owner and entitled to the immediate possession of the property, which affirmative averments must be deemed denied.

ID.—TRIAL OF ISSUES—OBJECTION UPON APPEAL.—The defendant having gone to trial upon the theory that the title, or right of possession of the property, was in issue, cannot, upon appeal, for the first time be heard to say that there was no such issue.

ID.—TAKING POSSESSION OF PROPERTY—IMMATERIAL MATTERS.—The facts that, prior to the commencement of the action, plaintiff had gone to defendant's lodging-house and taken possession of the property, and that the property was retaken by the defendant upon an order made by the police court, are immaterial matters having nothing to do with the right of possession of the property.

ID.—EVIDENCE—IMPROPER EXAMINATION BY COURT.—Where the defendant had testified nothing about what occurred prior to the commencement of the action as to taking possession of the property, either

upon direct or cross-examination, it was prejudicial error for the court, against the objection of the plaintiff, to question the defendant as to immaterial details of what occurred when plaintiff took possession of the property, which details could only tend improperly to arouse the passion and prejudice of the jury against the plaintiff.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

R. H. Countryman, for Appellant.

The answer took issue upon the question of title, and any defects in the complaint were cured by the answer. (*Daggett v. Gray*, 110 Cal. 171; *Vance v. Anderson*, 113 Cal. 532; *Cohen v. Knox*, 90 Cal. 266-76; *Schenck v. Hartford Fire Ins. Co.*, 71 Cal. 28; *Shively v. Semi-Tropic etc. Co.*, 99 Cal. 261, 262; *Kreling v. Kreling*, 118 Cal. 419.) The defendant cannot object upon appeal for the first time that there was no issue raised as to title. (*Barbour v. Flick*, 126 Cal. 628.) The plaintiff and defendant were each actors. (Gilbert on Distress and Replevin, 190; *O'Connor v. Blake*, 29 Cal. 317.) The complaint should be liberally construed, especially after verdict and upon appeal. (Code Civ. Proc., secs. 452, 475; *Ingraham v. Lyon*, 105 Cal. 257; *Alexander v. McDow*, 108 Cal. 29; *Treanor v. Houghton*, 103 Cal. 56; *People v. Rains*, 23 Cal. 129; *Mills v. Barney*, 22 Cal. 244; *Garner v. Marshall*, 9 Cal. 268.) The defendant was not entitled to the return of the property, his right of possession having ceased after the maturity of the mortgage, and could only be entitled to costs. (*O'Connor v. Blake*, *supra*; *Pico v. Pico*, 56 Cal. 453; *Harlan v. Ely*, 68 Cal. 527; *Williams v. Hahn*, 113 Cal. 477; *Wilson v. Brannan*, 27 Cal. 258; *Bolander v. Gentry*, 36 Cal. 110; 95 Am. Dec. 162; *Barney v. Brannan*, 51 Conn. 175; *Wheeler v. Train*, 4 Pick. 168; *Ingraham v. Martin*, 15 Me. 373.) The court erred to the prejudice of appellant in arbitrarily examining the defendant upon the acts of plaintiff in taking possession, as to which no testimony had been given on direct or cross-examination. (*Hill v. Finigan*, 62 Cal. 440.)

Frank Shay, for Respondent.

Plaintiff, in order to sustain the action, must have had the legal right of possession when the action was commenced, and an after-acquired title will not support it. (*Lambert v. McCloud*, 63 Cal. 163; *Fredericks v. Tracy*, 98 Cal. 658; *People's Sav. Bank v. Jones*, 114 Cal. 422; 20 Am. & Eng. Ency. of Law, 1055-57; *Ator v. Rix*, 21 Ill. App. 309; Cobbey on Replevin, sec. 96.) The plaintiff had no cause of action, and the defendant was entitled to judgment for the return of the property or its value. (*Fredericks v. Tracy*, *supra*; *Affierbach v. McGovern*, 79 Cal. 268; *People's Sav. Bank v. Jones*, *supra*; *Holly v. Heiskell*, 112 Cal. 174.)

COOPER, C.—The complaint, which is verified, alleges that on the fourteenth day of July, 1896, plaintiff was in the possession and entitled to the possession of certain personal property, consisting of furniture, described therein, of the value of one thousand dollars, and that on said day the defendant wrongfully took said furniture and ever since has refused to return it, although demand has been made for such return. Judgment is asked for the return of said property or, if a return cannot be had, for the value thereof. The action was commenced July 15, 1896. Plaintiff filed an affidavit and undertaking as required by the code, and the sheriff took the property from defendant and delivered it to plaintiff. On the twenty-seventh day of August, 1896, the defendant filed her verified answer in which she denied that on the fourteenth day of July, 1896, or at any other time, the plaintiff was entitled to the possession of the property described in the complaint or any part thereof, or that she ever at any time wrongfully or unlawfully took the said property from the possession of plaintiff.

Defendant further denied that any demand has ever been made upon her for its return, or that she ever refused to return it plaintiff. She further alleges affirmatively "that she is and at all of the times herein mentioned was the owner and entitled to the immediate possession" of the said property. That the property was taken by the sheriff of the city and county of San Francisco on the fifteenth day of July, 1896, and delivered to plaintiff, and that plaintiff refuses to

return it to her. Judgment is asked by defendant for a return of the property, or, in case a return cannot be had, for the value thereof. The jury found a verdict for defendant for a return of the property, and fixed its value at fifteen hundred dollars. Judgment was accordingly entered. An order was made denying a motion for a new trial, and this appeal is from the judgment and order.

It is claimed that the evidence does not support the verdict, and that the court committed errors in the conduct of the trial, in the rejection of evidence, and in its instructions to the jury. In order to make clear the points herein discussed, it will be necessary to briefly state the facts as disclosed by the record. In April, 1896, the defendant was in possession of a lodging-house at 1107 Bush street, in the city of San Francisco, and owned the furniture therein, being the same furniture described in the complaint, and was then indebted to one Fredericks, who at said time held a mortgage upon said furniture. The plaintiff was a dealer in furniture, and went with Fredericks to defendant's lodging-house for the purpose of either buying the furniture or the right of Fredericks thereto. Defendant called plaintiff aside and informed him that she had been having some trouble with her husband, and the matter was about to be compromised; that he had offered her sixty-five thousand dollars, which she had refused, and that it was only a question of a few weeks when she would have money. She stated to plaintiff that she wanted to borrow one thousand dollars to pay Fredericks and straighten out her business affairs. Her representations to plaintiff were such that plaintiff went to see one Jacobson about securing a loan of one thousand dollars for her upon the furniture. Jacobson went to the lodging-house and appraised the furniture, but refused to loan over seven hundred dollars upon it. Thereupon plaintiff told Jacobson that he would become personally responsible for the loan, and accordingly defendant borrowed the one thousand dollars of Jacobson, giving him a mortgage upon the furniture. The defendant received the money and paid off the mortgage to Fredericks, and used the balance for other purposes. The mortgage to Jacobson was dated April 16, 1896, was drawn by defendant's attorney, and was given to

secure her note of the same date for one thousand dollars, due six months after date, with interest from date at the rate of three per cent per month, payable monthly in advance.

The note contained the following clause: "And in case default be made in the payment of interest as above provided, and for the space of ten days after the same shall become due, then the whole of said principal sum and interest shall become immediately due and payable, at the option of the holder of this note."

The mortgage contained the following clause: "It is also agreed that, if the mortgagor shall fail to make any payments as in the said promissory note provided, then the mortgagee may take possession of said property, using all necessary force so to do, and immediately proceed to remove and sell the same at public or private sale, or to foreclose this mortgage and sell the same in the manner provided by law, and from the proceeds pay the whole amount in said note specified, and all costs and expenses of such seizure and sale, including a counsel fee not to exceed one hundred and fifty (150) dollars, and the remainder, if any, to the mortgagor."

After the interest became due demand was made upon defendant for it, but she refused to pay it, and has never paid any part of the principal or interest. During the trial the plaintiff offered in evidence an assignment of the mortgage in writing made by said Jacobson to him, duly acknowledged, and dated July 15, 1896. The court sustained the defendant's objection to the assignment. We think this was error. The assignment purported to convey to plaintiff title to the note and mortgage. Under the terms of the mortgage, as expressly written, the mortgagee had the right to the possession of the property mortgaged upon default of defendant in the payment of interest. This provision was valid. (Civ. Code, sec. 2927; *Bank of Woodland v. Duncan*, 117 Cal. 416; *Jones on Chattel Mortgages*, secs. 705, 706.) Having the right to possession given him by the terms of the mortgage he could maintain replevin for the mortgaged property. (*Jones on Chattel Mortgages*, sec. 442; *Cobbey on Chattel Mortgages*, sec. 499; *Wright v. Ross*, 36 Cal. 429; *Berson v. Nunan*, 63 Cal. 551.) The cause was tried in May, 1897. The note and

mortgage were then past due. Plaintiff, if the owner of the note and mortgage, was entitled to the possession of the mortgaged property at the maturity of the note November 16, 1896. It appears from the answer that plaintiff had obtained possession of the property at the commencement of the suit, and that defendant asked for the return thereof. If the defendant had the right to the possession of the property at the time the suit was commenced, but it had passed to plaintiff before the trial, the court should not decree the return of the property to defendant merely that it might again be replevined by plaintiff. (*Pico v. Pico*, 56 Cal. 458; *Bolander v. Gentry*, 36 Cal. 110; 95 Am. Dec. 162; *O'Connor v. Blake*, 29 Cal. 317.)

In the latter case it is said: "In actions of this character [replevin] both plaintiff and defendant are to be considered as actors, and where, as in the present case, the plaintiff has obtained possession of the property in dispute at the commencement of the action, and the defendant asks for a return of the property in his answer, he, to that extent, is an actor and stands in the attitude of a plaintiff, and if at the trial it shall appear that he is not entitled to the possession, for the reason that his interest therein has ceased intermediate the commencement of the action and the trial, and the right to the possession has vested in the plaintiff, the court will not render a judgment in favor of the defendant for the possession of the property or its value, but, will leave the property in the possession of the plaintiff where it belongs, and give the defendant a judgment for costs only."

Respondent contends that the complaint does not state a cause of action, for the reason that it was filed July 15th, and alleges that on the 14th of July the plaintiff was in the possession and entitled to the possession of the property. Under the authorities the contention would have to be sustained if the answer had not cured the defective complaint. The answer denies that on the 14th of July, or at any other time, the plaintiff was the owner or entitled to the possession, and alleges that defendant is (August 27th), and at all times has been, the owner and entitled to the possession of the property described in the complaint. This cured whatever defect there may have been in the complaint. (Pom-

eroy on Remedies and Remedial Rights, sec. 579; *Schenck v. Hartford Fire Ins. Co.*, 71 Cal. 28; *Cohen v. Knox*, 90 Cal. 266; *Daggett v. Gray*, 110 Cal. 172.) In the latter case it is said: "Whatever defect there may have been in the complaint in this particular was removed by the answer of the defendants, wherein they alleged their ownership of the goods, and denied that the plaintiff had had 'at any time since the twelfth day of March, 1893, any interest in, or been entitled to the possession of,' the property sued for. The rule is well settled that a complaint which lacks the averment of a fact, essential to a cause of action, may be so aided by the averment of that fact in the answer as to uphold a judgment thereon."

The defendant, having in her own behalf set up title in herself to the property for the purpose of having a judgment that it be returned to her, cannot now be heard to say there was no proper issue made as to title. The answer was deemed denied. The defendant, having gone to trial upon the theory that the title to the property was in issue, cannot here, on appeal, for the first time, be heard to say that there was no such issue. (*Barbour v. Flick*, 126 Cal. 628, and cases cited.)

It appeared in the testimony of plaintiff that, some time prior to the commencement of the action, the plaintiff had gone to defendant's lodging-house and taken the property. It also appeared from the answer of defendant that on July 14th she retook the property upon an order made by the police court of San Francisco. These matters had nothing to do with the right to the possession of the property at the time of the trial, nor at the time the action was commenced. Defendant was called as a witness in her own behalf, and no question was asked in her examination in chief or in her cross-examination as to these matters which occurred prior to the commencement of the suit. The witness had not testified to any such matters, and counsel were through with her examination. The judge thereupon, of his own volition asked the witness as follows:

"The Court.—Q. What occurred on July 2d, when Mr. Flinn came up there to take the property?

"Mr. Countryman.—The witness has not been asked that on direct or cross-examination, and, for that reason, we object.

"The Court.—That makes no difference whether she has or not. The jury are entitled to know the facts. The objection is overruled."

The witness then, in answer to the question and various other questions propounded by the court, stated that on July 2, 1896, the plaintiff came to her house, and, after some conversation, said "an oath to the law," and "took up a table and bric-a-brac and threw it out of the front window; he tore the portiere down between the doors, and took some other bric-a-brac and threw it down, and said: 'I feel like tearing the whole house to pieces.' And he told his men to take their own key and open the door of a closet in the house, and they did, and took everything from it." The witness further, in answer to questions by the court, said that plaintiff threatened to bring a patrol wagon and take Mr. Bell, who was ill, out of the house. That he had five or six men with him, one of whom was represented to be a deputy sheriff. That plaintiff took a key and went to defendant's private desk and opened it and scattered the papers all around, and took them to his own office. This testimony was all elicited in response to questions asked by the court and under plaintiff's objection. Among other questions by the court were the following:

"Q. He took everything out of the house?"

"Q. Did he leave the house bare?"

"Q. How many men did Mr. Flinn have with him?"

"Q. Were any papers served upon you?"

These questions were in regard to immaterial matters. They did not ask for evidence tending to show who was entitled to the possession of the property at the time the action was commenced nor at the time of the trial. They were of such a nature as to elicit evidence, and did elicit evidence wholly immaterial to the issue being tried, and which could not but tend to arouse the passion and prejudice of the jury against the plaintiff. It is the duty of the court in the trial of a case before a jury to confine the testimony to the issues and to sustain objections to all proper questions asked by counsel, which would only tend to prejudice the jury against either party. Such questions are none the less erroneous because asked by the presiding judge. In fact, they would generally be much more injurious. We think the questions were improper, and the error such as must have injured the plaintiff's cause. The views herein expressed make it

unnecessary to pass upon the various other questions discussed in the briefs.

The judgment and order should be reversed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1381. Department Two.—February 27, 1900.]

MARY A. HENEHAN, Respondent, v. WILLIAM H. H.
HART, Appellant.

PROMISSORY NOTE—EXTENSION OF TIME FOR PAYMENT—ORAL AGREEMENT.—The time for the payment of a promissory note past due cannot be extended for a definite period, so as to bind the payee, by an unexecuted oral agreement that the maker shall pay the interest monthly, according to the terms of the note, for such period.

FRIVOLOUS APPEAL—DAMAGES.—Where an appeal is entirely devoid of merit, the judgment will be affirmed, with damages to the respondent.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Edward A. Belcher, Judge.

The facts are stated in the opinion.

W. A. Kirkwood, and Aylett R. Cotton, for Appellant.

Mullany, Grant & Cushing, for Respondent.

COOPER, C.—Plaintiff recovered judgment. Defendant has appealed from the judgment and from an order denying his motion for a new trial. The complaint, which is verified, alleges that on July 15, 1895, the defendant executed and delivered to plaintiff a promissory note for fourteen hundred dollars, due one year after date, with interest from date at the rate of one per cent per month until paid. That the

interest was paid thereon up to March 1, 1897, but that the interest from said last-named date and the principal remain due and unpaid. A copy of the note is set forth in the complaint. The answer does not deny any of the allegations of the complaint, but affirmatively alleges as follows:

"That on or about the first day of December, 1896, it was mutually agreed between said plaintiff and said defendant that the time of payment of the promissory note mentioned in said complaint should be extended for one year from the first day of December, 1896, and that during said year the said defendant should pay said plaintiff interest upon the said promissory note at the rate of one per cent per month, and that, in consideration of the said promise to pay said interest during said year, the said plaintiff then agreed to extend the time of payment of the principal of said promissory note for the period of one year from the said date, to wit, from the first day of December, 1896."

On the trial of the case defendant testified to an oral agreement in substance as alleged in his answer. One Sarah E. Decker also testified that plaintiff had a conversation with her, in which plaintiff admitted, in substance, that she had made such oral agreement with defendant. The witness Decker said that defendant had been her attorney for many years, and that the money was borrowed from plaintiff for her benefit. This testimony was all given under plaintiff's objection and with leave to move to strike it out. The court afterward, on motion of plaintiff, made an order striking out the said testimony, and the ruling upon this motion presents the only material question in the case. The sole and only question here is, Was the verbal promise, as testified to and as alleged in the answer, extending the time of payment of the written instrument set forth in the complaint, binding upon plaintiff? We think it was not, and that the ruling of the court was correct. Section 1698 of the Civil Code provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, but not otherwise."

The promissory note set forth in the complaint is a contract in writing. It is claimed that it was altered. It is not claimed that it was altered by any contract in writing, but

by an oral agreement. The oral agreement has not been executed. The rate of interest agreed upon was the same as the promissory note provided for. It would have drawn that rate until paid if the agreement had not been made. The interest was not paid in advance, and no interest has been paid which was not due at the time it was paid according to the written terms of the promissory note. The contract extending the time one year was not executed at the time the action was brought and in the nature of things could not have been. An executed agreement is one the terms of which have been fully performed.

It is difficult to conceive how an oral agreement extending the time in which a written agreement is to be performed can be executed until the time has elapsed, and then the question could not arise. If the period of time mentioned in the oral agreement has not elapsed, then the agreement has not been executed. (*Platt v. Butcher*, 112 Cal. 635; *Thompson v. Gorner*, 104 Cal. 168; 43 Am. St. Rep. 81.) Counsel for appellant cites *Waugenheim v. Graham*, 39 Cal. 175, to the effect that the time for the performance of a contract in writing may be extended by parol. The case was decided in April, 1870, before the codes, and hence has no application to the rule laid down by section 1698. In the original section of the Civil Code, in effect January 1, 1873, it contained the words: "Except as to the time of performance, which may be extended by any form of agreement." The section was amended March 30, 1874, by dropping the quoted clause, and after the amendment went into effect, July 1, 1874, the section has continued as at present. We think the amendment was a necessary and wise one. It prevents the solemn written contracts, which the parties have made certain, from being tampered with, annulled, set aside, or extended by the oral evidence of interested parties. The section as amended lays down a valuable and salutary rule in regard to written instruments. It prevents the parties who have made a promissory note, after it has become due according to the time written therein, from making the defense that it is not due by reason of a parol promise to extend the time, which promise would depend upon the credibility of interested witnesses. The appeal in the case is entirely devoid of merit.

We advise that the judgment and order be affirmed, with fifty dollars damages to plaintiff.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed, with fifty dollars damages to plaintiff. McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 2060. In Bank.—February 27, 1900.]

JAMES HEALY et al., Petitioners, v. SUPERIOR COURT
OF LASSEN COUNTY, Respondent.

ESTATES OF DECEASED PERSONS—LETTERS TO PUBLIC ADMINISTRATOR—BOND—CONSTRUCTION OF CODE.—Under section 1727 of the Code of Civil Procedure, the official bond of the public administrator is ordinarily in lieu of the bond required of administrators generally, and he is not required to give bond in double the value of the personal property, and of the rents and profits of the real estate, under section 1388 of the same code, which has no application when letters are issued to him in his official capacity by order of the court.

ID.—JURISDICTION OF COURT—ADDITIONAL BOND.—The court is not required to take any additional bond upon the issuance of letters to the public administrators, but it has jurisdiction to require an additional bond in a less sum than is provided for in section 1388 of the Code of Civil Procedure, by virtue of section 1402 of the same code, if his official bond is known to be insufficient.

PETITION for writ of review to annul orders of the Superior Court of Lassen County, fixing the bond of the public administrator, approving the same, and ordering the issuance of letters. F. A. Kelly, Judge.

The facts are stated in the opinion of the court.

M. Marsteller, W. M. Boardman, and Frank J. Sullivan,
for Petitioners.

Goodwin & Goodwin, for Respondent.

HENSHAW, J.—This is an original application for a writ of review, wherein certain orders of the superior court sitting in probate in the matter of the estate of Matthew Healy, deceased, are sought to be annulled.

There had been a contest over the issuance of letters of administration in the estate of Matthew Healy between the nominee of certain heirs of the deceased and J. W. Hosselkus, public administrator of the county. As an outcome of the contest, the court made findings favorable to the contention of Hosselkus. It found, also, that the value of the personal property in the estate of the deceased, and the probable value of the annual rents, issues, and profits of the real property, were "about the sum of eighty-five thousand dollars." Letters of administration were ordered to Hosselkus as follows:

"The petition of Louis Abrahams praying that letters of administration upon the estate of Matthew Healy, deceased, be issued to him, and the petition of J. W. Hosselkus praying that letters of administration upon said estate issued to him as public administrator of the county of Lassen, said state, together with the respective oppositions thereto, coming on regularly to be heard on the twenty-seventh day of October, 1897, and due proof having been made to the satisfaction of the court that the clerk had given notice of the hearing of each of said petitions in all respects according to law, and all and singular the law and the evidence being by the court understood and fully considered, and the court having filed herein its written findings of fact and conclusions of law therefrom, now, therefore, in accordance with said findings of fact, it is by the court here adjudged and decreed that said Matthew Healy died intestate in the city and county of San Francisco on the twenty-sixth day of September, 1897; that he was a resident of Lassen county at the time of his death, and that he left estate therein and within the jurisdiction of this court.

"It is, therefore, in accordance with said findings, ordered that the petition of Louis Abrahams praying that letters of administration upon the estate of Matthew Healy, deceased, be issued to him, be and the same is hereby denied, and that J. W. Hosselkus be and he is hereby appointed administrator of said estate, and that letters of administration upon

the said estate issue to the petitioner, J. W. Hosselkus, as public administrator in and for the county of Lassen, state of California, upon filing a duly approved bond in the sum of twenty thousand dollars. Dated this eighteenth day of November, 1897."

An appeal from that order was prosecuted to this court, but the appeal was not sustained. (*Estate of Healy*, 122 Cal. 162.) The public administrator gave a bond in the penal sum nominated in the order. This bond was approved by the judge of the superior court and letters of administration were issued. By the judgment of this court are sought to be declared null and void the order of the superior court fixing the penal sum of the bond in twenty thousand dollars, the action of the court in approving a bond in that amount, and the letters issued to Hosselkus as administrator of the estate. The argument herein is that the public administrator, like every other person, when obtaining letters of administration under section 1365 of the Code of Civil Procedure, must give a bond in the amount required by section 1388 of the Code of Civil Procedure; that the order of the court fixing the bond in a less amount is in excess of jurisdiction and void; and that, as an appeal does not lie from the order, it is reviewable under this writ. But this argument cannot be sustained.

Section 1726 of the Code of Civil Procedure provides: "Every public administrator, duly elected, commissioned, and qualified, must take charge of the estates of persons dying within his county as follows: 1. Of the estates of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost; 2. Of the estates of decedents who have no known heirs; 3. Of the estates ordered into his hands by the court; and 4. Of the estates upon which letters of administration have been issued to him by the court."

Section 1727 of the Code of Civil Procedure declares: "Whenever a public administrator takes charge of an estate, which he is entitled to administer without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in like manner and on like proceedings as letters of administration are issued to other persons. His

official bond and oath are in lieu of the administrator's bond and oath, but, when real estate is ordered to be sold, another bond may be required by the court."

Section 1388 is a general section, applicable in its terms to every person to whom letters testamentary or of administration are directed to issue, but it is a rule of construction too well settled to require the citation of authority that the provisions of a general section give way before those of a particular or specific statute bearing upon the same subject matter. By section 1727 the public administrator is clearly excepted from the operation of section 1388, and it is expressly declared that the official bond and oath of the public administrator are in lieu of the administrator's bond and oath. The public administrator is the eighth class enumerated in section 1365 of the Code of Civil Procedure. He obtains letters of administration, not as an individual, but as public administrator by virtue of his office. In the present case, letters of administration were issued to him by order of the court. It was a case falling under the fourth subdivision of section 1726 of the Code of Civil Procedure. The language of section 1727 applies as fully to a case such as this as to any other case in which the official bond of the public administrator answers for the bond executed by the administrator in other cases. In the early case of *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237, it was said: "The public administrator is required to give a bond and take the official oath; and it would seem to have been the intention of the statute to dispense with the bond and oath required of other administrators in each particular case."

Under these provisions of the code, then, it was not necessary for the judge to have exacted any bond from the public administrator in addition to the one which he had given in his official capacity. That the court had the right so to do, and that it would be its duty so to do in proper cases, is clear. (Code Civ. Proc., sec. 1402.) But it was in no wise incumbent upon it to require in the first instance, or at all, a bond in twice the amount of the value of the personal property of the estate.

As the inquiry under this writ comes to an end when it is perceived that the court has not exceeded its jurisdiction in

making the orders complained of, and as such is manifestly the case in the present instance, the writ is discharged.

Temple, J., Garoutte, J., Harrison, J., Van Dyke, J., Beatty, C. J., and McFarland, J., concurred.

[L. A. No. 806. In Bank.—February 27, 1900.]

JAMES W. BYRNE et al., Appellants, v. JOHN H. DRAIN
Street Superintendent of the City of Los Angeles, Re-
spondent.

MUNICIPAL CORPORATIONS—CONTROL OF CHARTER BY GENERAL LAWS—CONSTRUCTION OF CONSTITUTION—SUSPENSION OF CHARTER PROVISIONS.—Section 6 of article XI of the constitution as it stood prior to the amendment of 1896, providing that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by the authority of this constitution, shall be subject to and controlled by general laws," is not to be construed as providing that charter provisions shall be repealed by a general law upon the same subject matter, but only that the operation of the inconsistent charter provisions shall be suspended during the paramount operation of the general law.

ID.—AMENDMENT OF CONSTITUTION—EXCEPTION OF MUNICIPAL AFFAIRS—RETROSPECTIVE OPERATION—RESTORATION OF CHARTER PROVISIONS.—The amendment of 1896 to section 6 of article XI of the constitution, inserting the words "except in municipal affairs," was retrospective in its operation, and applied to all existing charters. It had the effect to remove the paramount control of general laws in respect to municipal affairs, and to restore the operation of municipal charters in respect to such affairs, which were suspended by general laws prior to that amendment.

ID.—OPENING AND WIDENING STREETS—GENERAL LAW OF 1889—CHARTER OF LOS ANGELES.—The opening and widening of streets are "municipal affairs" within the meaning of the constitution; and the provisions of the charter of Los Angeles on that subject matter, which were suspended by the general law of March 6, 1889, were relieved from the control of that statute by the amendment of 1896 to section 6 of article XI of the constitution.

ID.—VOID ASSESSMENT UNDER GENERAL LAW.—The general law of March 6, 1889, having ceased to be operative in the city of Los Angeles, in 1896, an assessment thereafter made in that city based upon proceedings taken under the general law, and not under the charter, is void.

INJUNCTION—VOID SALE AND DEED—CLOUD ON TITLE.—An injunction will not be granted to restrain the street superintendent of the city of Los Angeles from selling real property in that city under a void sale to satisfy a void assessment for opening a street in proceedings taken under the general law in 1898. His deed under such sale would be void, and would cast no cloud upon the plaintiff's title.

ID.—PLEADING—MULTIPLICITY OF SUITS.—A mere naked averment in the complaint that the granting of the injunction will prevent a multiplicity of suits, which does not fairly appear from the nature of the the subject matter, or from any facts averred, is not a sufficient ground to sustain the injunction. The fact that the owner of the land might be compelled to defend his title, or to prosecute an action to quiet an adverse claim, cannot support an injunction, but the fact that he may successfully do either is ground against the injunction.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

John W. Mitchell, for Appellants.

The general law for opening and widening of streets merely suspended, and did not repeal, the provisions of the charter of Los Angeles under the operation of the constitution prior to the amendment of 1896, and the charter provisions were revived under the effect of that amendment. (*Bodefeld v. Reed*, 55 Cal. 299; *Lewis v. Clerk Santa Clara Co.*, 55 Cal. 604; *Seattle Coal etc. Co. v. Thomas*, 57 Cal. 197; *Smith v. His Creditors*, 59 Cal. 267; *Austin v. Caverly*, 10 Met. 332.) The amendment of 1896 applies to all existing charters, and the municipal laws now control in all municipal affairs. (*Morton v. Broderick*, 118 Cal. 486; *Proper v. Broderick*, 123 Cal. 456.) Injunction lies to prevent the sale of land improperly assessed for the opening of streets. (High on Injunctions, secs. 377, 539, 554.)

Walter F. Haas, for Respondent.

The charter is only a statute of this state, and is repealed by necessary implication by the operation of a general law of the state inconsistent therewith, and providing a full scheme for the same subject matter. (23 Am. & Eng. Ency. of Law,

479, 492; *Dillon v. Bicknell*, 116 Cal. 111; *Malone v. Bosch*, 104 Cal. 683; *People v. Sands*, 102 Cal. 18; *Miller v. Curry*, 113 Cal. 644; *Third Nat. Bank of St. Louis v. Harrison*, 8 Fed. Rep. 721; *The Chase*, 14 Fed. Rep. 854.) The charter provisions of Los Angeles were superseded by the inconsistent act of March, 1889, providing a new and general law in reference to the opening and widening of streets. (*Davies v. Los Angeles*, 86 Cal. 39.) The insolvency cases are inapplicable. Congress could not repeal a state law. But a state law may repeal by implication another statute. A repeal law is not revived by the cessation of the operation of the repealing law. (*People v. Hunt*, 41 Cal. 435.) The amendment to the constitution did not revive the repealed part of the charter of Los Angeles. (*Thomason v. Ruggles*, 69 Cal. 465.) If the statute of 1889 is inoperative in Los Angeles, the proceedings thereunder are void, and no cloud upon title can be cast thereunder, and upon that supposition injunction will not lie. (*Luco v. Brown*, 73 Cal. 3; 2 Am. St. Rep. 772; *Dean v. Davis*, 51 Cal. 407; *Gates v. Lane*, 49 Cal. 266; *Hartman v. Reed*, 50 Cal. 485; *Williams v. Corcoran*, 46 Cal. 553; *Lick v. Ray*, 43 Cal. 83; *Lent v. Tillson*, 72 Cal. 404.)

HENSHAW, J.—This action was for an injunction to restrain the street superintendent of the city of Los Angeles from selling certain real property of the plaintiffs to satisfy an assessment levied by the municipal authorities in the matter of the opening of a street. The proceedings for the street opening were begun in September, 1898, and were conducted under the provisions of the general law for the opening and widening of streets. (Stats. 1889, p. 70.) The charter of the city of Los Angeles contains full provisions touching the same subject matter, which provisions differ radically from those of the general street law. (Charter of Los Angeles, secs. 148-89.) These facts are made to appear by the complaint, and the primary question raised on demurrer and thus presented for consideration is whether, at the time of the institution and prosecution of these proceedings, the provisions of the city charter or the provisions of the statute of 1889 constituted the controlling law. If the latter control, then the proceedings are admittedly valid; if the former, then the proceedings are void upon their face.

The charter of the city of Los Angeles was adopted on January 31, 1889. At that time the constitution provided: "Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." (Const., art. XI, sec. 6.) There was no general law upon the subject of the opening of streets until March 6, 1889, when the statute under which these proceedings were had was approved. In 1896, the above-quoted section 6 of article XI of the constitution was amended so that it now reads, and read at the time of the initiation of the proceedings for opening the street: "Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws." From January 31, 1889, until the passage of the act of March 6, 1889, it is admitted that the provisions of the charter of the city relative to these matters were in full force and effect. After the passage of the act of March 6, 1889, it is conceded that they ceased to be operative unless restored by the terms of article XI, section 6, as amended.

By respondent it is contended that the effect of the adoption of the general statute of March 6th was absolutely to extinguish, annul, and repeal the charter provisions. By appellant it is insisted that, since the charter provisions were valid and in force when the charter became the organic law of the city, the effect of a general statute upon those valid provisions under the very terms of the constitution was not to work a repeal, but to effect merely a suspension of their operation—to subject them to the control of such general law while it remained in operation. This was the view taken by the learned judge of the trial court in passing upon the demurrer, and we think it unquestionably sound. It is to be borne in mind that the case which we are considering is not one where the provisions of a charter, when the charter becomes a law, are in conflict with existing general laws, but it is the case of charter provisions admittedly valid at the time of their adoption coming in conflict with the provisions of a general law subsequently passed. The constitution does not declare that the provisions of the charter under such circumstances are repealed or annulled. It declares merely that the

charter provisions shall be subject to and controlled by general laws. As was well said by the trial judge in passing upon the demurrer: "The word 'subject,' when used as an intransitive verb, means 'to become subservient to,' and as a transitive verb it means 'to cause to become subject or subordinate.' The word 'control' is defined as follows: 'To exercise a directing, restraining, or governing influence over; direct; counteract; regulate.' (Standard Dictionary.) Neither of these terms is used to express the idea of repealing, extinguishing, or doing away with. Nothing in the context indicates such a meaning. The very idea of being subject to or controlled by a higher power or law necessarily implies the continued existence of the thing controlled or subjected so long as the control or subjection continues. That which is extinguished, repealed, or destroyed cannot be said to be afterward under control or subjection." The situation thus presented is not dissimilar to that which obtained during the existence of the national bankruptcy act. It was competent for this state to pass an insolvency act while the bankruptcy act of the United States was in force, but the operation of the state law was suspended, and the state law was controlled by the federal act. (*Seattle Coal etc. Co. v. Thomas*, 57 Cal. 197.) It is similar to the condition of things that exists when a state law providing for the inheritance by aliens of property within its domain is in conflict with the treaty regulations of the United States upon the same subject matter. It is uniformly held, not that the state laws are abrogated or repealed, but that they are suspended and controlled by the treaty during the period of its existence. (*De Geofroy v. Riggs*, 133 U. S. 258; *Blythe v. Hinckley*, ante, p. 431.)

By the above-quoted amendment to the constitution in 1896, we think it clear that the provisions of the charter of Los Angeles touching upon this matter were relieved from the control of the statute of March 6th. The amendment was retrospective, and applied to all existing charters. (*Morton v. Broderick*, 118 Cal. 486; *Popper v. Broderick*, 123 Cal. 456.) That the matter of opening the streets of a municipality is a municipal affair is not disputable under the authorities. (*Sinton v. Ashbury*, 41 Cal. 531; *People v. Holliday*, 93 Cal. 241; 27 Am. St. Rep. 186; *Hellman v. Shoulters*, 114 Cal. 141.) As the charter of the city of Los Angeles

ceased, upon the adoption of the amendment to article XI, section 6, to be subject to and controlled by general laws in its municipal affairs, it follows from the foregoing that its provisions relative to street opening came again into force, and that the assessment in this case was based upon proceedings taken under a law having no longer any applicability to the city. The assessment was, therefore, void, as the trial court properly decided.

The proceedings resulting in the assessment being void, the deed of the superintendent after sale of the property would itself be void and cast no cloud on the true title. Whatever relaxation of the rule may be found in other states, it is well established in this that under such circumstances the extraordinary relief of injunction will not be granted. (*Savings etc. Soc. v. Austin*, 46 Cal. 415; *Williams v. Corcoran*, 46 Cal. 553; *Houghton v. Austin*, 47 Cal. 646; *Dean v. Davis*, 51 Cal. 406; *Lent v. Tillson*, 72 Cal. 404; *Esterbrook v. O'Brien*, 98 Cal. 671.) Nor is the naked averment in the complaint that the granting of the injunction will prevent a multiplicity of suits of itself sufficient to justify the issuance of the writ, unless it fairly appears from the nature of the subject matter that a multiplicity of suits would follow if the writ were not granted. In this case it cannot be perceived how such a result would ensue. The mere fact that the owner of the land might be compelled either to defend his title or to prosecute an action against a possible asserted claim based upon the void deed, would not of course be sufficient. Yet this is all which in the present instance he could be called upon to do. If action were brought against him based upon the void deed, his defense would be complete. If, upon the other hand, a claim of right or title founded upon the same instrument should be asserted, he could successfully prosecute an action to have it declared a nullity.

The judgment appealed from is affirmed.

Temple, J., McFarland, J., Harrison, J., Van Dyke, J., Garoutte, J., and Beatty, C. J., concurred.

[S. F. No. 1750. Department One.—February 28, 1900.]

WELLS, FARGO & CO., Respondent, v. JOSEPH ENRIGHT et al., Defendants. COMMERCIAL AND SAVINGS BANK, Appellant.

STATUTE OF LIMITATIONS—AGREEMENT NOT TO PLEAD THE STATUTE—EXECUTION BY BANK—AUTHORITY OF PRESIDENT—SUPPORT OF FINDING.

—Where an agreement not to plead the statute of limitations was executed in the name of a bank by its president, evidence that the president was the general manager of the bank, having general power under its by-laws to manage its affairs, and to perform all duties which its interests may require, when not limited by its by-laws, or by express instructions from the board of directors, and that the president and vice-president thought the execution of the agreement was for the best interest of the bank, is sufficient to support a finding that the bank executed the agreement. The fact that the president signed it as such and not also as manager, is immaterial.

Id.—CONSIDERATION OF AGREEMENT—FORBEARANCE TO SUE.—Where the agreement not to plead the statute of limitations expressed on its face that the promise was made in consideration of a promise by the creditor to refrain from instituting suit for the period of six months, before the expiration of which the bar of the statute would otherwise attach, though it had not attached at the date of the agreement, and the plaintiff forebore to sue for that period of time, such forbearance and suspension of the plaintiff's right to sue is a valuable consideration for the agreement.

Id.—VALIDITY OF AGREEMENT—WAIVER OF PERSONAL PRIVILEGE—ESTOPPEL—PUBLIC POLICY.—¹¹An agreement not to plead the statute of limitations is a mere agreement to forego a personal privilege secured to the debtor by statute, which the debtor may waive, and such agreement may operate to estop him from a defense of the statute. Such agreement is not opposed to any public policy, but is, on the contrary, a valid agreement which sound morals require should be enforced. ¹¹

Id.—REASONABLE LIMITATION.—It seems to be a reasonable limitation to allow an action to be brought after such an agreement at any time within the period of statutory limitation dating from the agreement.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—INTEREST—PRESUMPTION.

—The stockholders of a corporation are liable for their proportion of the whole of the debt of the corporation, including the interest, which is as much a part of the debt as the principal; and a loan of money to the corporation is presumed to be upon interest, unless it is otherwise expressly stated at the time in writing.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion.

Jackson Hatch, and Jesse W. Lillienthal, for Appellant.

E. S. Pillsbury, and F. D. Madison, for Respondent.

CHIPMAN, C.—Action to enforce the liability of the defendant Commercial and Savings Bank and others as stockholders in the Shasta Lumber Company. All the defendants, except appellant, paid their proportionate shares of the debt before the trial, and as to them the action was dismissed. Defendants pleaded the statute of limitations. Plaintiff had judgment, from which and from an order denying motion for new trial this appeal is prosecuted.

Appellant states in its brief that the only question arising on the appeal involves its plea of the statute of limitations, except a question, also raised, as to the liability to pay interest. The questions presented all revolve around a certain agreement in writing alleged by plaintiff to be a waiver of the statute of limitations. A fair summary, together with a *verbatim* copy of certain parts of this agreement, is as follows: "This agreement, made this twenty-seventh day of January, A. D. 1896, by the undersigned with Wells, Fargo & Co., a banking corporation, having an office in the city and county of San Francisco, state of California, witnesseth"; recites that the undersigned were, on January 30, 1893, stockholders in the Shasta Lumber Company in the number of shares stated; recites the indebtedness of the lumber company to plaintiff on that day; recites a still further indebtedness contracted April 21, 1893, and still other indebtedness at later dates in that year not necessary to state here: "Whereas, said Wells, Fargo & Co. are about to commence suit against the undersigned to recover the *pro rata* amount due from each of them to said company on account of said indebtedness as stockholder of said Shasta Lumber Company, and the undersigned desire to delay such suit; now, therefore, to the end that said Wells, Fargo & Co. do refrain, for six months from date hereof, from instituting suit against the undersigned on account of their liability as stockholders in said

Shasta Lumber Company, for the indebtedness hereinbefore stated, the undersigned, and each of us, promise and agree with said Wells, Fargo & Co., in consideration that it will forbear the enforcement of the collection of said sums by suit against us for said period of six months from date, that in the event of any action being commenced thereafter to recover our proportionate shares of such indebtedness, we and each of us will not plead the statute of limitations to such action. Witness our hands the day and year aforesaid." Then follow the signatures of several stockholders, defendants, and number of shares of each stated opposite each name, and immediately thereafter the document continues as follows:

"The Commercial and Savings Bank does not admit that it is a stockholder in said Shasta Lumber Company, but simply held the stock as collateral security. It waives the statute of limitations as to any stock that may be proved to belong to said bank.

"THE COMMERCIAL AND SAVINGS BANK, San Jose,

"By B. D. MURPHY,

"President.

"An extension of six months is granted pursuant to the foregoing agreement.

HOMER S. KING,

"Manager Wells, Fargo & Co."

The complaint was filed March 27, 1897, fourteen months after the agreement was made. The oldest liability accrued January 30, 1893, and the agreement was made January 27, 1896, three days before the statute would have barred the remedy. It is admitted that appellant was a stockholder as alleged in the complaint.

Appellant relies upon the bar of section 359 of the Code of Civil Procedure, and claims that the agreement in question is not such a one as to take the case out of the operation of the statute and as is referred to in section 360 of the Code of Civil Procedure. It is further claimed that the defendant bank did not sign the agreement; that it is without consideration, and whether it be considered as executed by appellant or not, it indefinitely suspends a right to plead the statute, and is therefore void, because contrary to public policy. Some other points are made by appellant, but they

depend upon the foregoing; for example, that a mere waiver to plead the statute is not a waiver under all circumstances that may afterward arise, and that the agreement does not operate as an estoppel.

1. Did appellant execute the agreement? The evidence tended to show that Murphy, who signed for appellant, was the president and manager of appellant at the time, and had been for many years previously; that during this time the entire management of the bank was left to Murphy and to the vice-president, Findlay, in the president's absence; and that the directors had allowed them to act upon their own judgment and as they thought best for the interests of the bank, and that it was not customary to report their actions to the directors, nor to ask ratification thereof, nor to first obtain special authority before performing particular acts relating to general business; and that this had been the course of business permitted by the directors since 1889; that the acts of the president had never been questioned by the directors; in short, the evidence tended to show that Murphy, as president and manager, had been allowed to do pretty much as he pleased in managing the affairs of the bank. There was a by-law of the bank reading as follows: "The manager shall be the general agent of the corporation and of the board of directors, and, as such agent, shall have a general supervision of the business of the corporation.... He shall have power to cancel all mortgages or other instruments under seal, taken as security for indebtedness due the bank, and perform all other duties which the interests of the corporation may require, limited only by the by-laws and the express instructions of the board of directors." The evidence was that both Murphy and Findlay thought the agreement was in the best interest of the bank, but that the directors were never called upon to authorize or ratify it, nor does it appear that they knew of its execution. The evidence justified the finding of the court that the agreement was entered into by appellant. (*McKiernan v. Lenzen*, 56 Cal. 61; *Greig v. Riordan*, 99 Cal. 316; *Los Angeles etc. v. Los Angeles*, 106 Cal. 156.) The fact that Murphy signed the agreement as president and not also as manager is immaterial. (*Los Angeles etc. v. Los Angeles*, *supra*.)

2. Appellant contends that the agreement was without consideration, citing *Shapley v. Abbott*, 42 N. Y. 447, 1

Am. Rep. 548, *Andrew v. Redfield*, 98 U. S. 225, and *Kellogg v. Dickinson*, 147 Mass. 432, in the last of which cases there was indorsed on a promissory note the following: "Paid on the within note ten dollars, and agree that I will not take any advantage of the statute of limitations"; and the agreement was held invalid for want of consideration. In the first two cases cited the promise was verbal, and there was no agreement on the part of the creditor; and in the last case the creditor made no promise to delay action. Here the agreement was in writing, and expressly states a consideration. Plaintiff promised to and did forbear suit for six months. As was stated in *Belloe v. Davis*, 38 Cal. 256, "it is well settled that forbearance to sue is a sufficient consideration to support a contract." What may constitute a valuable consideration "may be the surrender, suspension, or forbearance of a legal right to process for the enforcement of the collection of the debt." (*Frey v. Clifford*, 44 Cal. 335, 341.)

3. Was the agreement such as can be said to be opposed to public policy? Judge Story said, in *Vidal v. Girard*, 2 How. 127, 197: "What is the 'public policy' of a state, and what is contrary to it; if inquired into beyond what its constitution, laws, and judicial decisions make known, will be found to be matter of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will differ."

This court sustained an agreement entered into between the nephews and the testator in her lifetime not to contest her will (*In re Garcelon*, 104 Cal. 570; 43 Am. St. Rep. 134), as against the plea that the contract was opposed to public policy. It was pointed out in that case that a contract is not to be arbitrarily set aside as void as being against public policy. The right to plead the statute of limitations is but a privilege, and in no manner extinguishes the debt, and no debtor is under any obligation to the state or toward third persons to plead it, except as in the case of administrators and executors, trustees, and perhaps some others acting in representative capacities, where the law imposes the duty. This court has shown by its decisions that it attaches no great sancity to this privilege, for where the party failed to plead the statute, and afterward sought to do so by amendment of its answer, and the trial court refused to allow the amend-

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X | ment, the ruling was upheld as a power properly exercised, for the reason that the amendment could not be said to be in furtherance of justice. (*Bank of Woodland v. Heron*, 122 Cal. 107, and cases there cited.) There is not wanting a legislative expression as to the wisdom of withholding the privilege altogether in certain cases; for example, depositors in savings banks to recover a deposit (Code Civ. Proc., sec. 348), an action against a director of a corporation for misfeasance in office (Civ. Code, sec. 309); nor are judicial opinions lacking as to the right, as between the parties, to waive or prolong the statute of limitations. (*Smith v. Lawrence*, 38 Cal. 24; 99 Am. Dec. 344; *Wood v. Goodfellow*, 43 Cal. 185.) The direct question has not been answered by this court so far as we have been able to discover. We have no hesitation, however, in holding that the agreement before us violates no principal of public policy, but, on the contrary, was one which every consideration of sound morals requires us to enforce.

It was said in *State Trust Co. v. Sheldon*, 68 Vt. 259: "The question presented by the pleadings is whether the defendants are estopped by their agreement from pleading the statute of limitations in bar of plaintiff's action. It is urged that the agreement to waive the statute is void because, by private agreement, it seeks to avoid a statute, and is against public policy. The general rule is, that no contract or agreement can modify a law, but the exception is that, where no principle of public policy is violated, parties are at liberty to forego the protection of the law. Statutory provisions designed for the benefit of individuals may be waived, but, where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual. The statute limiting the time within which action shall be brought is for the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may, therefore, be waived in legal form, by those who are entitled to it; and such waiver, when acted upon, becomes an estoppel to plead the statute." (Citing numerous cases to the same effect.) We think this a correct statement of the law.

The supreme court of the United States regarded such an agreement as operating by way of estoppel *in pais* to a de-

fense under the statute of limitations. (*Randon v. Toby*, 11 How. 493.) Respondent cites cases from the District of Columbia, Maine, South Carolina, Vermont, Texas, Mississippi, New Jersey, Tennessee, and New York. We find that they support its position. See, also, Wood on Limitations, section 76, where it is stated that if the promise be made before the debt is barred, and in consideration of forbearance to sue and the creditor forbears, "it is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period, dating from such promise, expires, either by way of estoppel or as a conditional promise to pay the debt in case the plaintiff proves it." Conceding that some of the cases cited by appellant tend to support its contention, they do not convince us that there is any rule or principle of public policy violated by an agreement to waive the statute of limitations under the circumstances here disclosed. It is probably true that after an agreement to waive the statute has been entered into, in consideration of forbearance to sue, the courts would place some limit of time beyond which the statute would not be suspended. In the case of 147 Massachusetts, cited by appellant, the action was brought after forty years. Some of the cases, as Mr. Wood does, place this limit within the statutory period, dating from the agreement, and this seems to be a reasonable limitation. But we are not called upon to decide, and do not decide any further than that in our opinion the present action was brought in time.

4. Appellant is liable for interest. Section 322 of the Civil Code makes the stockholders liable for their proportion of the debt of the corporation. Interest was as much a part of the debt as the principal of the notes, which constituted most of the indebtedness (*Knowles v. Sandercock*, 107 Cal. 629); and as to the sums loaned by plaintiff to the lumber company, as money had and received, there is a presumption that it was upon interest, "unless it is otherwise expressly stipulated at the time in writing." (Civ. Code, sec. 1914.)

The judgment and order should be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[Crim. No. 504. Department Two.—February 28, 1900.]

THE PEOPLE, Respondent, v. SAMUEL J. DE GRAAFF,
Appellant.

CRIMINAL LAW—LARCENY—INTENT TO STEAL—EMBEZZLEMENT.—One who obtained the money of the wife of another person with the intent from the beginning to steal it, under the false pretense that it was to be paid to others who could secure an appointment on the police force for her husband, and that it was to be returned to her if the appointment was not secured, and who gave his note therefor, and promised to have it indorsed by the others, is not guilty of embezzlement.

ID.—FALSE PRETENSES—PARTING WITH TITLE—QUESTION OF FACT.—The question whether the crime was that of larceny or the obtaining of money under false pretenses, depends upon the question of fact whether the owner of the money, at the time of parting with the possession of it, intended to part with the title thereto. If she did not intend to part with the title, but merely gave it to the defendant, to be applied to a special purpose, if opportunity offered, otherwise to be returned to her, and in no event to be used by the defendant for his own purposes, the offense of taking it, by the defendant, with intent to steal it, is larceny, and not the obtaining of money under false pretenses.

ID.—PROPRIETY OF INSTRUCTIONS—MANNER OF JUDGE.—The propriety the instructions given by the judge can only be determined from their contents, and the manner of the judge in giving them cannot be considered upon appeal, unless misconduct is made to appear in some mode provided by the code.

ID.—ERRONEOUS MODIFICATION OF INSTRUCTION—HARMLESS ERROR.—An erroneous modification of a correct instruction asked by the defendant by inserting a negative which made the instruction absurd, and which was equivalent to a refusal to give the instruction, is harmless error, where it appears that the whole substance of the instruction as requested was repeatedly given in the charge of the court.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William T. Wallace, Judge.

The facts are stated in the opinion of the court.

Frank McGowan, McGowan & Squires, and Brousse Brizard, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

TEMPLE, J.—The defendant appeals from a conviction for grand larceny, and the principal question presented here is whether the testimony on the part of the prosecution proved the commission of that offense, or simply tended to prove the offense of obtaining money by means of false and fraudulent pretenses, or embezzlement.

One Healy was desirous of getting an appointment upon the police force of San Francisco. The defendant volunteered to assist Healy, and pretended to have great influence with certain prominent citizens of San Francisco. He mentioned the names of four whom he said were willing to assist, but said they wanted a hundred dollars each. Healy, or rather his wife, gave defendant the money to be used in that way, but defendant agreed to refund the money if he did not succeed in getting the appointment, and gave his note for the money and promised to have it indorsed by the four influential persons he mentioned. The money was delivered to the defendant for the express purpose of being given by defendant to such four persons, and upon such express promise as to repayment. A few days after Healy parted with his money the defendant stated to Mrs. Healy, with whom most of the negotiations had been made, that he had paid the money to such persons. Much more was said and done, but this statement sufficiently shows the nature of the transaction.

The theory of the prosecution is very clearly stated by the learned judge of the trial court in an instruction as follows: "Now if, instead of in her bureau drawers, in the supposed case, she, Mrs. Healy, then and there had this money in her hands, and was thereup induced by tricks and artifice practiced upon her by the defendant, he having at the time in his mind the intent to thereby steal it from her feloniously, was induced to deliver and did deliver it to him for the declared specific purpose of his applying it to the promotion of the purpose of her husband to obtain an appointment upon the police force, should an opportunity to so apply it offer, and otherwise to return it to her, she not intending thereby to part with the title to the property, but only to part with its possession, and only for the specific purpose aforesaid; and the defendant received the money from her, and had at the time in his own mind a secret purpose and intent not to so apply it, nor to return it to her in any event,

but to thereby feloniously steal it, then the defendant was thereby guilty of grand larceny; and if you find these supposed facts to be true beyond all reasonable doubt, then you should find the defendant guilty as charged."

The defendant does not question the soundness of the legal proposition contained in the instruction, but he contends there was no evidence from which the jury could have found that Mrs. Healy did not intend to part with the title to the money when she delivered it to defendant. It was not given to defendant to apply the same to a specific purpose if an opportunity to so apply it should offer, but the intention was that he should hand it at once to the four named persons, who, he said, did not want the money for themselves, but for others who could procure the appointment.

Mrs. Healy testified that finally defendant came to her and said: "These men say they need one hundred dollars apiece, not for themselves, but to use on men that have the inside track in getting these positions. That is how the money is to be divided up." After some hesitation, Healy said: "Well, Sam, that is all the money we have got, and I want you to guard it with jealous care." Sam said: "You needn't worry about the money, Healy. If anything happens you don't get your position on the police force, you will get your money back. I want to act fair with you—do what is right." He said: "I tell you what I will do; I will give you my note and have it indorsed by these men." Healy's testimony is practically the same. Upon these assurances the money was handed to the defendant, and he gave his undorsed note for the amount. Mrs. Healy said they took the note as a receipt. They then believed defendant was what he said he was, a millionaire's son, and had influence. The defendant did not give the money to the persons named, but appropriated the entire sum to his own use.

It may be that the evidence does not warrant the precise theory upon which this instruction and various others upon the same point were based. The evidence for the prosecution was not conflicting, and all tended to show that the Healys expected the defendant to give the money at once to the four named persons, who would themselves so apply it as to get the appointment if possible. It also appears that defendant

had no understanding with the persons named, and did not intend to deliver the money to them, but the whole pretense was a trick to enable him to get possession of the money that he might convert it to his own use. He intended from the beginning to steal it, and it was, therefore, not embezzlement. (*People v. Saloree*, 62 Cal. 139; *People v. Morino*, 85 Cal. 518; *People v. Smith*, 23 Cal. 280.)

The jury were very specifically told that to find the defendant guilty they must be satisfied that the felonious intent existed at the time the money was delivered. I can see no difference whether the understanding was that the defendant was to buy influence with the money, if an opportunity occurred, or the four named persons were to hold it for that purpose, and to return it in case the pretended purpose could not be accomplished.

Whether the offense was larceny, or the obtaining money under false pretenses, depended upon the question of fact whether Mrs. Healy intended to part with the title to the money. Upon that matter the jury was fully and correctly instructed, and there was evidence to sustain the conclusion reached by the jury.

The appellant contends that the instructions are in many respects unfair, and constituted really an argument for the prosecution. This is charged to have been done more by the manner of the judge than by any improper language used. It is said that he was emphatic in statements which tended to help the prosecution, and that the qualifications which would have been favorable to the defense, and without which the instructions would have been erroneous, were so delivered as to seem unimportant. Manner is likely to impress persons differently, according to their interest. We are unwilling to believe that the judge did as charged, and, at all events, misconduct, if it existed, must be made to appear in some mode provided in the code before it can be availed of here.

The most serious charge of error is in regard to the modification of an instruction asked for by defendant. One point insisted upon by the defendant during the trial was that if any offense was proven it was embezzlement, or the obtaining of money under false pretenses, and he asked for an instruction that: "It is not sufficient in law to warrant you in obtaining a verdict of guilty in the case that you are

convinced beyond a reasonable doubt that the defendant is guilty of some offense other than that charged in the information." The court, through some inadvertence, no doubt, modified the instruction by inserting the word "not" before convinced. This made nonsense of the instruction, and was the equivalent of a refusal to give it. It was a proper instruction, and if its place was not filled by others, was important. It must be regarded as prejudicial, unless it is very clear that the idea it would have conveyed was as well presented in other instructions, and it seems quite evident it was. Over and over the jury was told that it was essential to the prosecution that the guilty intent on the part of defendant must have existed at the time he got the money. If his fact existed the offense could not be embezzlement. They were as emphatically told that they must also find from the evidence, in order to convict, that Mrs. Healy did not intend to part with the title to the money, but merely gave it to defendant to be applied to a special purpose, if opportunity offered, otherwise to be returned to her, but in no event to be used by De Graaff for his own purposes. If this state of facts existed it would not constitute the offense of obtaining money under false pretenses. These are the only other offenses of which it was possible that the jury could find the defendant guilty.

Some other exceptions were taken, but they seem of little importance and do not tend to show injury to defendant.

Judgment and order affirmed.

Henshaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 960. In Bank.—March 1, 1900.]

A. KRAUSE, Respondent, v. A. K. DURBROW, Appellant.

CORPORATIONS—ELECTION FOR DIRECTORS—QUALIFICATION OF VOTERS—REGISTRATION OF STOCK.—The election of directors of all corporations having a capital stock, including mining corporations, is regulated by sections 307 and 312 of the Civil Code; and no person is qualified to vote at such an election unless he is a *bona fide* stockholder, having stock registered in his name on the stock-books of the corporation at least ten days prior to the election.

IN.—ACT CONCERNING MINING CORPORATIONS—QUALIFICATION OF HOLDERS OF UNREGISTERED CERTIFICATE—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—There is no natural or inherent distinction between mining and other corporations for profit, or any peculiarity of the former, which will authorize special legislation for the mode of conducting the election of their directors; and section 3 of the act of 1880 for the further protection of stockholders in mining corporations, which authorizes the holders of indorsed certificates of stock therein to vote at the election of directors thereof, though the stock is not registered in their names upon the books of the corporation for a period of ten days, as required by section 312 of the Civil Code, is special legislation, in violation of section 25 of article XI of the constitution, the case being one in which a general law can be made applicable.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Charles W. Slack, Judge.

The facts are stated in the opinion of the court.

Deal, Tauszky & Wells, for Appellant.

Only *bona fide* stockholders having stock registered in their own names on the books of the corporation ten days prior to the election were entitled to vote in person or by proxy. (Civ. Code, secs. 307, 312; *Smith v. San Francisco etc. R. R. Co.*, 115 Cal. 584; 56 Am. St. Rep. 119; *People ex rel. Probert v. Robinson*, 64 Cal. 373; *Market Street Ry. Co. v. Hellman*, 109 Cal. 571, 589, 592.) Section 3 of the act of 1880, for the protection of stockholders in mining companies, is special legislation and unconstitutional. The distinction between mining and other corporations as to the election of directors is arbitrary and without intrinsic

reason. (*Pasadena v. Stimson*, 91 Cal. 238; *Bruch v. Colombet*, 104 Cal. 347-51; *Darcy v. Mayor of San Jose*, 104 Cal. 642, 645, 646; *Bloss v. Lewis*, 109 Cal. 493-97; *People v. Central Pac. R. R. Co.*, 105 Cal. 576, 584; *Ex parte Jentzsch*, 112 Cal. 468.)

W. T. Baggett, for Respondent.

The act of 1880 for the protection of the stockholders in mining companies is valid and constitutional. (*McDonald v. Conniff*, 99 Cal. 386, 391; *Miles v. Woodward*, 115 Cal. 308.) Laws may be restricted to a particular class of individuals or of corporations. (*Abeel v. Clark*, 84 Cal. 226; *Ex parte Lichtenstein*, 67 Cal. 359; 56 Am. Rep. 713; *Primghar State Bank v. Rerick*, 96 Iowa, 238.) The act of 1880 is not objectionable on any ground.

HARRISON, J.—The Gould & Curry Silver Mining Company is a corporation organized under the laws of this state, having seven directors, and with a capital stock divided into 108,000 shares. At the annual meeting in 1896 for the election of directors for the year then ensuing there were present in person, or by proxy, stockholders representing in the aggregate 98,338 shares of the capital stock. At this election Krause, the plaintiff herein, presented certificates of stock representing in the aggregate 12,830 shares, which had been issued to persons other than himself, and were indorsed in blank by these persons, and offered to vote the shares represented by these certificates, and declared that he voted 12,730 of said shares cumulated seven times, thus aggregating 89,110 votes for himself as director, and 100 of said shares cumulated seven times and aggregating 700 votes for G. C. Snider as director. The persons in whose names these certificates of shares had been issued appeared upon the books of the corporation as stockholders therein, and proxies in writing for 11,980 of said shares had been executed to Durbrow, the defendant herein, and one Zadig. Zadig and Durbrow claimed the right, and offered by virtue of the proxies thus given them, to vote these 11,980 shares, and objected to Krause's offer to vote them, upon the ground that the certificates had not been issued in his name, and that he did not ap-

pear upon the books of the corporation as the owner of the shares represented by the certificates, and that the persons appearing as stockholders on the books of the company were the only ones who had the right to vote said shares in person or by proxy. The chairman sustained this objection and refused to receive the vote of Krause, and permitted Zadig and Durbrow to vote the 11,980 shares. By reason of this ruling Durbrow was declared elected as one of the directors. If the votes which Krause offered to cast had been counted as he desired to vote them, he would have received votes sufficient to elect him a director in the place of Durbrow. Durbrow entered upon his duties as director, and the board of directors refused to recognize the right of Krause in the premises. An agreed statement embodying these facts was submitted to the superior court for its determination as to the right of the respective parties to the office of director. Judgment was rendered by that court that the plaintiff had been elected a director in the corporation, and was entitled to enter said office, and that the defendant surrender the office and permit the plaintiff to discharge the duties of director. From this judgment the defendant has appealed.

Section 307 of the Civil Code provides: "All elections must be by ballot, and every stockholder shall have the right to vote in person or by proxy the number of shares standing in his name, as provided in section 312 of this code, for as many persons as there are directors to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors, multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit."

Section 312 of the Civil Code, referred to therein, provides: "At all elections or votes had for any purpose there must be a majority of the subscribed capital stock or of the members represented, either in person or by proxy in writing. Every person acting therein, in person or by proxy or representative, must be a member thereof or a *bona fide* stockholder, having stock in his name on the stock-books of the corporation at least ten days prior to the election."

Under these provisions, it must be conceded that the only persons entitled to vote at an election for directors are those whose names are registered as stockholders on the books of

the corporation. In 1880, however, the legislature passed an act (Stats. 1880, p. 131) entitled: "An act for the further protection of stockholders in mining companies," providing, in the first section, that the directors of any mining corporation shall not dispose of or encumber the mining ground belonging to it, or acquire additional mining ground, without ratification thereof by the holders of at least two-thirds of its capital stock.

Section 3 of this act is as follows: "It shall not be lawful for any such corporation, or the secretary thereof, to close the books of said corporation more than two days prior to the day of any election. At such election the stock of said corporation shall be voted by the *bona fide* owners thereof, as shown by the books of said corporation, unless the certificate of stock, duly indorsed, be produced at such election, in which case said certificate shall be deemed the highest evidence of ownership, and the holder thereof shall be entitled to vote the same." The superior court held that under the provisions of this section Krause was entitled to cast the votes offered by him. The appellant contends that this section of the statutes is unconstitutional for the reason that it is in violation of the thirty-third subdivision of section 25, article IV, of the constitution which provides as follows: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: 33. In all other cases where a general law can be made applicable."

This provision of the constitution has been construed many times by this court in its application to different acts of the legislature, and although no rule has been formulated, or indeed can be formulated, which will be applicable to every case, the court in its opinions has stated certain conditions which must exist in order to give authority to the legislature to exempt classes of individuals from the operation of a general law. The rule for determining whether a statute is in violation of this provision of the constitution is aptly expressed in *Pasadena v. Stimson*, 91 Cal. 238, where it is stated that a law is not general or constitutional "if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." In *Bruch v. Colombet*, 104 Cal. 347, it

was said: "The legislature may classify for the purpose of legislation where there is some intrinsic reason why the law should operate upon some and not on others, or should affect some differently from its effect upon others"; and in *Darcy v. Mayor*, 104 Cal. 642, it was said: "This classification, however, must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or special may seem to be general but for the purpose of meeting different conditions naturally requiring different legislation." In *People v. Central Pac. R. R. Co.*, 105 Cal. 584, it was said: "The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It may be founded upon some natural or intrinsic or constitutional distinction, but the distinction must be of such a nature as to reasonably indicate the necessity or propriety of legislation restricted to that class." In *Pasadena v. Stimson*, *supra*, it was held that a provision in a law prescribing for certain classes of municipal corporations a mode of exercising the right of eminent domain different from that provided by the general law on that subject was in violation of this provision of the constitution. In *Cullen v. Glendora Water Co.*, 113 Cal. 503, an act providing a special procedure for seeking a new trial in proceedings for the confirmation of irrigation districts, different from that prescribed in the Code of Civil Procedure, was held to be a special law in a matter to which existing laws were appropriately applicable. In *Ex parte Clancy*, 90 Cal. 553, it was held that the provision in the Insolvent Act allowing an appeal to a person adjudged guilty of contempt could not be upheld in view of the general law making orders in contempt final.

In view of these decisions it must be held that the above provision of the act of 1880 is unconstitutional. There is no natural or inherent distinction between mining and other corporations for profit which will authorize special legislation for the mode of conducting the election of their directors,

nor are mining corporations distinguished by any peculiarities which demand for them special legislation upon this subject. For this purpose all of these corporations stand in the same relation to the subject of the law, and the attempt to create a different law in this respect for a mining corporation from that prescribed for other corporations is an arbitrary selection of a specific class in a case where no natural or intrinsic difference exists. They are not classified for any purpose in the constitution, nor is there any reference to them in that instrument from which an authority for such legislation might be inferred. There may be matters connected with conducting the business of mining corporations which will justify special legislation in reference thereto; but no reason is perceived or has been suggested why they should be excepted from the general law in reference to conducting their annual election for directors.

The judgment is reversed.

Temple, J., Van Dyke, J., Henshaw, J., Garoutte, J., and Beatty, C. J., concurred.

[S. F. No. 2094. In Bank.—March 2, 1900.]

E. B. LONG et al., Petitioners, v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Respondents.

INTERPLEADER—DISMISSAL AS TO PLAINTIFF—REVERSAL OF JUDGMENT BETWEEN LITIGANTS—COSTS UPON APPEAL—ORDER RESTRAINING EXECUTION—CERTIORARI—MANDAMUS.—Where an action of interpleader involving a disputed right to a fund which the plaintiff deposited in court was dismissed as to him, and the defendants litigated their respective claims to the fund, and, upon appeal from the final judgment, the interpleader was approved, and the judgment reversed as between the litigants, execution for the costs of appeal cannot issue against the plaintiff. An order restraining such execution cannot be annulled upon *certiorari*; nor will *mandamus* lie to compel the clerk to issue it.

PETITION to the Supreme Court for a writ of review to annul an order of the Superior Court restraining an execution for costs upon appeal and to compel the clerk to issue such execution. John Hunt, Judge.

The facts are stated in the opinion of the court.

T. C. Spelling, and George D. Collins, for Petitioners.

Charles N. Fox, for Respondents.

THE COURT.—This is a petition in this court for a writ of *certiorari* to review a certain order made by the respondent, the superior court, and also for a writ of mandate to compel the issuance of an execution for costs. An alternative writ of mandate was issued.

The matters here involved grow out of a certain action entitled *San Francisco Savings Union v. E. B. Long and others*, in which a certain judgment was entered in the superior court which, upon appeal, was reversed by this court. (See *San Francisco Sav. Union v. Long*, 123 Cal. 107.) That was an action of interpleader brought by the plaintiff therein to have sundry claimants to a deposit in the bank of plaintiff litigate among themselves, and have determined to whom the money should be paid. In the trial court in that action the defendants therein made no objection to the right of plaintiff to commence the action, but appeared and set out their respective rights as against each other, "and upon this state of facts the interlocutory decree was entered, and the plaintiff, having deposited the money in court, was dismissed from the case." (*San Francisco Sav. Union v. Long, supra.*) Thereupon the defendants in that action litigated their respective rights to the money, and a judgment having been entered in favor of some of them and against others, those who were defeated appealed to this court. The order of this court was: "The judgment is reversed and the cause remanded for a new trial in accordance with this opinion." The clerk of this court entered judgment in accordance with the direction of this court and inserted in the judgment, "Appellants to recover costs of appeal herein." When the *remittitur* went down the petitioners herein, who were the appellants in said action, sought to have an execution for costs issued against the San Francisco Savings Union, which was the interpleader in said action. The superior court made an order restraining the issuance of such an execution, and the clerk of said court refused to issue such an execution. The purpose of this pres-

ent proceeding is to review and annul the order of the superior court restraining execution, and to compel the clerk by mandate to issue an execution. It is quite apparent that the Savings Union having been dismissed from the case in the court below, and that action having been approved here, the judgment for costs does not run against said San Francisco Savings Union, and the petitioners here, as the appellants in said case, have no right to an execution against said Savings Union.

The alternative writ of mandate is discharged, and the petition for *certiorari* is denied.

[L. A. No. 506. In Bank.—March 2, 1900.]

ELIZABETH A. HODGKINS, Respondent, v. E. T. WRIGHT, Appellant.

ASSUMPSIT—DEFENSE—CONVEYANCE OF REAL PROPERTY TO PLAINTIFF—

PAYMENT—SECURITY—SALE AND APPLICATION OF PROCEEDS.—It is a defense to an action of *assumpsit* for money paid for the use of the defendant at his request, that the defendant conveyed real property to the plaintiff either in payment of the debt, or by way of security, for the purpose and intention that the plaintiff should sell the property and apply the proceeds to the payment of the indebtedness, and that plaintiff has not exhausted the security.

MORTGAGES—ABSOLUTE CONVEYANCES TO SECURE DEBT—CONTRARY STIPU-

LATIONS IMMATERIAL.—Conveyances, absolute in form, given in fact to secure the payment of a debt, are mortgages, subject to foreclosure and to the right of redemption, no matter how expressly the parties have stipulated that they shall not be so deemed, or that, in case of a failure to pay, the title of the mortgagee shall be absolute, and that no foreclosure need be had, and that the debtor does not intend to redeem.

ID.—TRUST DEEDS—ABSENCE OF WRITING—PAROL EVIDENCE—PROOF OF MORTGAGE SECURITY.—Conveyances absolute in form may be shown by evidence to be mortgagees, but not to be trust deeds to secure indebtedness from the grantor to the grantees. Trusts in real estate, other than resulting trusts, can be created only by writing; and oral evidence that it was intended that the grantee should sell the property and give the grantor credit for the proceeds, does not establish an express trust, but indicates a mortgage security.

LD.—DOCTRINE AND EFFECT OF TRUST DEEDS—PERSONAL ACTION.—The doctrine of trust deeds to secure indebtedness will not be extended to deeds which are not expressly of that character. In effect, they are mortgages with power to sell, though not requiring foreclosure. It seems that one who has conveyances which are expressly trust deeds to secure indebtedness cannot bring a personal action until the security is exhausted.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

Graves, O'Melveny & Shankland, for Appellant.

M. W. Conkling, and J. W. Swanwick, for Respondent.

TEMPLE, J.—The action is for money laid out and expended for the benefit of defendant and at his request. The complaint contains two counts. The first is for three thousand and eight dollars and sixty-eight cents paid to the Farmers' and Merchants' Bank September 20, 1894 for the use of defendant. The second cause of action is for money paid by defendant to the First National Bank of Los Angeles for the use of plaintiff, between the first day of December, 1893, and the first day of July, 1894.

Several defenses were interposed, upon all of which there was much controversy, but I do not find it necessary to consider more than one. Plaintiff had judgment, and the defendant appeals from the judgment and from the order refusing a new trial.

Among the defenses interposed was one that the defendant had compromised, settled, and paid the demand of plaintiff; that she had accepted certain real estate from him in payment, and had surrendered to him all the evidences of indebtedness which she held. In a separate defense he averred that the demand of plaintiff was secured by mortgage upon certain real estate, to wit, upon the property which in the other defense it was averred had been conveyed to her, and which she had accepted in full satisfaction.

The case was tried with the assistance of a jury, which re-
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turned a special as well as a general verdict. No findings were made.

Referring especially to the defenses mentioned, the jury found as follows:

"3. Were the transfers in evidence by defendant to plaintiff in September and October, 1893, followed by delivery of the notes formerly held by the banks, intended by the parties as a settlement of Mrs. Hodgkins' claims? A. No.....

"7. Were any deeds to real property given in September and October, 1893, by defendant to plaintiff intended as a mortgage or security for the indebtedness? A. No.

"8. Was the conveyance of the seven lots in North Cucamonga, mentioned in the evidence, made to Mrs. Hodgkins for the purpose and with the intention that she should sell such property and apply the proceeds, as far as the same would go, in payment of the defendant's indebtedness to her? A. Yes."

The answer to interrogatory 7 might in its nature be either a conclusion of law or a finding of an ultimate fact. Taken in connection with the answer to the succeeding question, it can only be deemed a conclusion of law, unless the jury merely intended to say that the parties did not intend that the conveyances should be deemed and treated as mortgages, which is really an immaterial matter. The question was whether they were given to secure the performance of an obligation—that is, to secure the payment of a debt. If they were given for that purpose they were mortgages, no matter how expressly the parties agreed that they should not be so deemed. They cannot, by agreeing to call or to consider an instrument which hypothecates real estate for the payment of a debt something other than a mortgage, avoid the necessity of foreclosure or deprive the debtor of his right to redeem. If in fact and in law the instrument is a mortgage, it does not matter that the parties intend and stipulate that it shall be something else, and that, in case of a failure to pay, the title of the mortgagee shall be absolute.

Some time before the conveyances in question were made, defendant had conveyed to plaintiff certain property as security and had taken from her written defeasances. Having afterward concluded to take the benefit of the Insolvent Act,

defendant submitted to plaintiff a list of his property and offered to convey to her anything she thought of value. Plaintiff knew of defendant's purpose and then selected certain lots which she asked to have conveyed to her. Certain property, belonging to defendant was mortgaged to other parties. At plaintiff's request, such property was conveyed to the mortgagees each by deed absolute in form, and the said mortgagees gave a written agreement to plaintiff to the effect that she could redeem the property within a specified time. Defendant also reconveyed by deeds absolute on their face the property which had previously been conveyed to her. He also conveyed to her by similar deeds other real estate. There was no writing stating the purpose of these conveyances, and nothing seems to have been said upon the subject. At the request of the defendant, plaintiff delivered to him the notes which she had paid for him, and her counsel requested Wright to delay filing his petition in insolvency so that the conveyances would not be deemed a fraudulent preference. Wright did apply for his discharge and did not include plaintiff among his creditors.

Wright contends that the deeds were given and accepted in settlement and discharge of his indebtedness, but the court found otherwise. In another defense he contended that plaintiff's demand was secured by mortgage upon real estate, and therefore plaintiff ought not to be permitted to sustain this action.

The plaintiff testified that Mr. Wright told her he "would have to go through insolvency quite a long time before he did so," and she took certain conveyances from him. She also said, "Mr. Anderson has told me there was nothing to be gotten out of Mr. Wright, he did not think, because he didn't have anything." Mr. Wright, however, promised that she should lose nothing by him. She then testified as follows: "Q. Well, do you remember why these deeds were made? A. Made to secure me or get something out of the property if I could, that is what they were made for, because he had nothing else, he said." On rebuttal she said: "There was no arrangement made for Mr. Wright's redeeming the property. He said he was going into insolvency and could not expect to redeem it. He said he wanted to arrange it so as to save me the expense of foreclosure, and he did."

This corresponds quite closely, although not entirely, with the special verdict. The property was not turned over in payment or satisfaction, but to secure her so far as possible that she might get something out of Wright's property, but as Wright was insolvent and was about to apply for his discharge the right to redeem would be of no value to him, therefore he intended to fix it so that she would not need to foreclose. Either this was payment or it was a mortgage. Certainly, it was not intended that Mrs. Hodgkins should take the property and allow nothing for it.

Plaintiff's counsel argue that it was intended that Mrs. Hodgkins should sell the property and give Wright credit for what she was able to make out of it, and that this establishes that the deeds were deeds of trust. There was no evidence of an agreement that Mrs. Hodgkins should do anything of the kind, and there is no finding to that effect. Had there been such finding it would not have changed the result. The statute provides that a deed absolute on its face may be shown to be a mortgage. Trusts in real estate other than resulting trusts can be created only by writing.

Trust deeds, to secure payment of a debt, are an anomaly in our system, and are admittedly inconsistent with the policy of this state in regard to mortgages. It is at least doubtful if they would be now sustained but for a line of decisions made before they were very seriously questioned. In such case the doctrine will not be extended to deeds which are not expressly of that character.

It is not admitted that if the conveyances were expressly trust deeds, given to secure the indebtedness, plaintiff could bring a personal action before she had exhausted the security. It has only been held that such deeds are not mortgages which require foreclosure. In effect they are mortgages with power to sell. (*Sacramento Bank v. Alcorn*, 121 Cal. 379.)

It is admitted that plaintiff still holds some of the real property so conveyed to her. She cannot, therefore, maintain this action.

Judgment and order reversed.

Harrison, J., McFarland, J., Garoutte, J., Henshaw, J., and Beatty, C. J., concurred.

Rehearing denied.

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ABATEMENT. See Election, 8.

ABORTION. See Criminal Law, 52.

ACCOUNTING. See Estates of Deceased Persons, 7-14; Mortgages, 4, 5; Partnership, 1.

AGENCY. See Appeal, 16; Attorneys at Law; Insurance, 1; Partnership, 6, 7.

ALIENS.

1. **CONTROL AND INHERITANCE OF PROPERTY—TREATY.**—The question as to the rights of aliens to possess, enjoy, and inherit property in the United States is a proper subject matter of treaty; and a treaty regulating those rights must control all state legislation contrary thereto as the supreme law. (*Blythe v. Hinckley*, 431.)
2. **POWER OF STATE—LAWS NOT IN CONFLICT WITH TREATY.**—A state has the primary right to regulate the tenure of all real property within its limits, and may allow aliens to take, hold, and dispose of property, real and personal, within the state, in so far as its laws are not in conflict with the express provisions of a paramount treaty of the United States. (*Id.*)
3. **INHERITABLE BLOOD—CHANGE OF COMMON LAW.**—A state may, by express law, change the common-law rule that an alien was not of inheritable blood, and may thereby remove the disability of the alien to inherit, if there is no paramount law to the contrary. (*Id.*)
4. **CONSTRUCTION OF TREATY WITH GREAT BRITAIN—SILENCE AS TO INHERITANCE—VALIDITY OF CODE PROVISIONS.**—The silence of the treaty between the United States and Great Britain upon the subject matter of the right of citizens of Great Britain to inherit property within the United States, is not equivalent to a denial of that right, and cannot affect the power of a state to confer the right. That treaty is not in conflict with section 671 of our Civil Code, allowing aliens, including citizens of Great Britain, to "take, hold, and dispose of property, real and personal, within this state." (*Id.*)

ALIENS (Continued).

5. **NONRESIDENT ALIENS—OPERATION OF CODE.**—The provisions of section 671 of the Civil Code are not made to operate extraterritorially, by conferring a right upon non-resident aliens to take and hold property within this state. That section merely provides a rule with respect to property within the state, and confers a right to be enjoyed within its jurisdiction. (Id.) ..
6. **CONSTRUCTION OF STATE CONSTITUTION.**—Section 17 of article I of the state constitution is merely intended to secure the rights of foreigners of the classes named, and does not operate as a limitation upon the power of the legislature to extend similar privileges to other foreigners or aliens. (Id.)

AMENDMENT. See Banks, 1, 2.

APPEAL.

1. **FRIVOLOUS APPEAL—DAMAGES.**—Where an appeal is entirely devoid of merit, the judgment will be affirmed, with damages to the respondent. (Henehan v. Hart, 656.)
2. **REVIEW—ARGUMENT.**—Upon appeal from a judgment and from an order denying a new trial, the appeal from the judgment cannot be considered if taken too late, and the sufficiency of the evidence will not be reviewed upon appeal from the order denying the new trial, where the brief of the appellant relies only upon alleged errors of law, occurring at the trial. (Swafford v. Board of Education of City of Petaluma, 484.)
3. **ORDER FOR NONSUIT—JUDGMENT—ENTRY—TIME FOR APPEAL.**—An order for a nonsuit entered in the minutes of the court, which does not show what were the grounds of the motion, and does not purport to be a dismissal of the action, nor a judgment of any kind, and upon which no execution could be issued, but is a mere memorandum from which data for a judgment might be drawn, is not a dismissal of the action, nor a judgment of nonsuit, within the meaning of section 581 of the Code of Civil Procedure, declared to be effective when entered in the minutes of the court. The time for appeal does not run in such case until the entry of a proper judgment of nonsuit of the plaintiff, which operates as a final disposition of the case. (Ferris v. Baker, 520.)
4. **APPEAL FROM JUDGMENT—REVIEW, WHEN LIMITED TO JUDGMENT-ROLL.**—Upon appeal from a judgment taken more than sixty days after the rendition thereof, the case must be reviewed upon the judgment-roll alone, without reference to the question whether the evidence was sufficient to support the findings and judgment or not. (Reed v. Johnson, 538.)
5. **SERVICE OF NOTICE UPON FICTITIOUS DEFENDANTS—DISMISSAL.**—An appeal will not be dismissed for failure of a plaintiff appealing to serve his notice of appeal upon defendants fictitiously named where no service of summons was made upon anyone under the fictitious

APPEAL (Continued.)

names, and no appearance was made by any other defendant than the one served with the notice of appeal. (*Benson v. Bunting*, 532.)

6. **WRIT OF REVIEW—APPEALABLE ORDERS.**—A writ of review cannot be allowed for the purpose of annulling orders from which an appeal may be taken. (*Southern California Co. v. Superior Court of San Diego County*, 417.)
7. **ORDERS AFTER JUDGMENT—ACTION INVOLVING REAL ESTATE—ORDERS STRIKING OUT STAY BOND, AND DIRECTING PAYMENT OF SMALL JUDGMENT.**—In an action involving the title or possession of real estate, transferred from the justice's court to the superior court, this court has appellate jurisdiction; and orders made after judgment therein in the superior court, striking out an undertaking to stay execution pending an appeal to this court, and directing the sheriff to pay moneys collected under the execution to the plaintiff in satisfaction of the judgment in a sum less than three hundred dollars, are appealable, and cannot be annulled upon writ of review. (*Id.*)
8. **AMOUNT INVOLVED IN APPEALABLE ORDERS IMMATERIAL.**—All special orders made after final judgment in the superior court are made appealable, without reference to any amount in value that may be involved in the order. The order striking out the stay bond being unquestionably appealable, the order directing the payment of the money to the plaintiff is a mere incident thereto, and is proper if the former order is sustained; but both orders are appealable by the express language of the code. (*Id.*)
9. **DISMISSAL OF WRIT OF REVIEW.**—A writ of review to annul appealable orders must be dismissed. (*Id.*)
10. **OFFICIAL BOND OF EXECUTOR OR ADMINISTRATOR—CONSTRUCTION OF CODE.**—Section 965 of the Code of Civil Procedure only permits the official bond of an executor, administrator, or guardian, who is such at the time of taking the appeal, to stand in place of an undertaking on appeal. The averments of such bond do not make it on its face an undertaking on appeal, and the sureties thereon are only liable by virtue of the provisions of that section, and cannot be charged by virtue of that section, unless the case is strictly within its terms. (*Estate of McDermott*, 450.)
11. **APPEAL BY RESIGNED ADMINISTRATRIX—ORDER DISALLOWING ACCOUNTS—ABSENCE OF SEPARATE UNDERTAKING—DISMISSAL.**—An appeal from an order disallowing accounts, taken by one who had prior to the appeal resigned the position of special administratrix, and who had requested and secured the appointment of the public administrator in her stead, cannot be sustained by the official bond given by her as special administratrix, regardless of the correctness of the action of the court in making the change without the settlement of her accounts; and in the absence of a separate

APPEAL (Continued).

undertaking the appeal must be dismissed. (Id.)

12. **APPEAL BY SURETY—PARTY NOT AGGRIEVED—INTERVENTION—DISMISSAL.**—A surety on the bond of an administratrix is not a party aggrieved by an order disallowing her accounts, and has no right of appeal therefrom merely by reason of such suretyship, if not made a party to the record by proper intervention. A petition in intervention by the surety merely for the purpose of appeal from the order, and an allowance thereof by the superior court can have no significance or effect; and the appeal must be dismissed. (Id.)
13. **DISMISSAL—NEW TRIAL STATEMENT—OBJECTION NOT APPEARING IN RECORD.**—It is not ground for the dismissal of an appeal from a judgment and from an order denying a new trial, that the statement on the motion for the new trial and the amendments thereto were not presented and filed with the clerk in time; and where neither such fact nor objection thereto appears in the settled statement, and they appear only in a separate statement signed by the respondent, which is no part of the record, and has no place in the transcript, the fact therein stated is not ground for disregarding the settled statement. (*Barclay v. Blackinton*, 189.)
14. **DISMISSAL—UNDERTAKING REFERRING TO PRIOR APPEAL—FILING AFTER SECOND APPEAL.**—An undertaking on appeal executed after the filing of a first notice of appeal, and prior to the filing of a second notice, which recites that the appellant has appealed, and that the sureties undertake in consideration of such appeal, refers only to the first appeal, and limits the liability of the sureties thereto. The fact that the undertaking was filed by the appellant's attorney subsequently to the second appeal does not constitute it an undertaking thereupon; and the second appeal must be dismissed for want of an undertaking. (*Hibernia Sav. Soc. v. Freese*, 70.)
15. **DEFINITENESS OF UNDERTAKING.**—A valid undertaking on appeal must refer with definiteness to the particular appeal to which it is intended to relate, and, if it fails to do so, it is insufficient. An undertaking definitely referring to a pending appeal when executed cannot be wrested from its natural language, so as to refer to a subsequent appeal, because filed thereafter. (Id.)
16. **EFFECTIVENESS OF UNDERTAKING—FILING—AUTHORITY OF ATTORNEY—LIMITED AGENCY FOR SURETIES.**—Although an undertaking on appeal does not become effective until the date of filing, its validity has reference only to the appeal to which it refers; and, although the attorney for the appellant is the agent of the sureties for the purpose of filing the undertaking, his agency is limited to the filing of it in the particular appeal to which it has reference. (Id.)

APPEAL (Continued).

17. **BOND TO STAY EXECUTION—JUDGMENT AGAINST SURETIES—PROCEDURE IN ORIGINAL ACTION.**—The entry of judgment against the sureties upon a bond to stay execution pending an appeal is not a special proceeding within the meaning of section 23 of the Code of Civil Procedure, but is part of the procedure in the original action authorized by section 942 of the Code of Civil Procedure, and is in sequence of the judgment rendered therein against the appellant. (*Hawley v. Gray Brothers Artificial Stone Paving Co.*, 560.)
18. **STIPULATION OF SURETIES—PARTIES TO ACTION.**—Under the provisions of the code, the sureties upon the appeal bond stipulate that upon the affirmance of the judgment appealed from, if the appellant does not pay the same within thirty days after the filing of the *remittitur*, judgment may be entered against them for the amount of said judgment, with the interest then due thereon; and they thereby make themselves parties to the original action, and the proceedings against them are taken therein. (*Id.*)
19. **PREMATURE JUDGMENT—EFFECT OF REVERSAL.**—The reversal of a premature judgment entered against the sureties less than thirty days after the filing of the *remittitur* affirming the judgment leaves the parties in the same position held by them before it was rendered. It does not affect or impair the obligation of the sureties upon their undertaking, which is the same as if no judgment had been rendered against them; and the plaintiff is still entitled to enforce that obligation by a proper motion for judgment against them. (*Id.*)
20. **PRESUMPTION—REQUEST OF APPELLANT FOR VACATION OF JUDGMENT.**—Upon appeal from a judgment properly entered against the sureties, it will be presumed, if necessary, that the former premature judgment reversed upon appeal was vacated at the request of the appellants. (*Id.*)

See Assignment; Criminal Law, 8, 14; Election, 8; Estates of Deceased Persons, 29, 46, 53; Findings, 2; Insolvency, 5; Interpleader, 3; Justice's Court, 5-7; Mortgage, 14; Receiver, 3-5; Street Assessment, 1, 2; Trusts, 3; Water and Water Rights.

ARBITRATION. See Estates of Deceased Persons, 58-63.

ARSON. See Criminal Law 1.

ASSIGNMENT.

1. **JUDGMENT—UNDERTAKING ON APPEAL—RIGHTS OF ASSIGNEE.**—The assignment of a judgment only, without the assignment of the undertaking on appeal therefrom, does not pass to the assignee any right of action upon the undertaking on appeal, whether the assignment be made pending the appeal, or after the judgment has become a finality. (*Chilstrom v. Eppinger*, 326.)

ASSIGNMENT (Continued).

2. **DISTINCT CONTRACT OF SURETIES—ACTION BY ASSIGNEE OF JUDGMENT.**—The contract of the sureties in undertaking on appeal and to stay proceedings is distinct from and independent of the judgment, and not a necessary incident to it, and an action thereupon by a mere assignee of the final judgment cannot be sustained. (Id.)

See Surety, 1-3, 10.

ATTACHMENT.

1. **NATIONAL BANK.**—Under the national banking act, no attachment can issue against a national bank from a state court. (Dennis v. First Nat. Bank of Seattle, 453.)
2. **POWER OF CONGRESS.**—Congress, in the exercise of its power to create national banks, has power to grant them special immunities, and to protect them against attachment and other proceedings in state courts, by which their efficiency may be impaired. (Id.)
3. **CONSTRUCTION OF STATE LAWS.**—The process of attachment is a creature of the statute; and all of the attachment laws of the states are to be construed as if they contained a proviso in express terms that they are not to apply to suits against national banks. (Id.)

See Estoppel, 5, 6.

ATTORNEYS AT LAW. See Appeal, 16; Justice's Court, 6, 7.

BAIL. See Criminal Law, 8.

BANKS.

1. **LIABILITY OF STOCKHOLDERS TO DEPOSITORS—STATUTE OF LIMITATIONS—AMENDMENT OF COMPLAINT.**—The liability of the stockholders of a bank to its depositors is barred by the statute of limitations within three years from the date of the deposit, if action is not sooner commenced thereon. If a new cause of action as to a deposit is not stated in the complaint, the statute of limitations cannot be evaded under the guise of an amendment to the complaint; but if an amendment more fully sets forth a cause of action upon a deposit defectively alleged in the original complaint, the amendment merely supersedes the original, and takes its place, as of the same date, without affecting the identity of the original cause of action, as respects the statute of limitations. (Nellis v. Pacific Bank, 166.)
2. **ACTION BY ASSIGNEES—AMENDMENT TO CORRECT MISTAKE IN NAMES OF DEPOSITORS—IDENTITY OF CAUSES OF ACTION.**—Where the original complaint against the stockholders of the bank was filed by the assignees of many depositors, the causes of action upon which were in fact owned by them before the commencement of the action,

BANKS. (Continued).

and correctly stated the amount of each deposit sued upon, but, by mistake, alleged that certain of the deposits were made by their immediate assignors, which were in fact made by others whom their assignors lawfully claimed as assignees, an amendment correcting the mistake is allowable, and does not affect the identity of the causes of action originally sued upon, as respects the statute of limitations. (Id.)

3. CLAIM NOT ASSIGNED.—There can be no recovery by the plaintiff of a claim alleged to have been assigned to the plaintiff, but which was not in fact assigned, and of which the plaintiff is not the owner and holder. (Id.)

See Attachment; Equity; Gift; Insolvency, 3, 4.

BILL OF EXCEPTIONS.

1. SETTLEMENT—FILING.—A bill of exceptions to the ruling of a judge, if not presented at the time of the ruling, must be presented and settled upon notice pursuant to the statute, and must then be filed. (Estate of Carpenter, 582.)
2. SETTLEMENT BY EX-JUDGE—DELAY IN FILING.—A bill of exceptions settled by an ex-judge, not dated, and not filed until nine years after the ruling excepted to, is not in time, and cannot be considered. (Id.)
3. SETTLEMENT BY SUCCEEDING JUDGE.—A bill of exceptions relating to matters transacted before a former superior judge, and not to be used on motion for a new trial, must be settled by him if living, and willing to settle it, and a succeeding judge has no authority to settle the bill, if it does not appear that the former judge was dead, or had refused to settle it. (Id.)
4. INSUFFICIENT BILL—ABSENCE OF EXCEPTION—STATEMENT OF FACTS—IMPROPER SETTLEMENT.—A so-called bill of exceptions, stating no exception, and reciting facts and many things not transpiring in court, and not properly settled, cannot be noticed. A bill stating no exception shows no reason for any statement of facts, which should only be inserted or explain exceptions shown to have been taken. (Id.)
5. INSUFFICIENT REFERENCE TO DOCUMENTS.—A bill of exceptions containing a reference to certain papers, "being the papers set forth and marked exhibits 'A' and 'B' in the foregoing bill of exceptions hereto attached and herewith filed," does not sufficient refer to exhibits so marked in a separate bill of exceptions not attached and separately filed. (Id.)

See Estates of Deceased Persons, 13.

BOND. See Appeal, 10-12, 14-20; Executors and Administrators, 1, 2; Insolvency, 2; Surety.

BRIDGES. See Counties.

BUILDING AND LOAN ASSOCIATION. See Receiver.

BURGLARY. See Criminal Law, 2, 3.

CERTIORARI. See Appeal, 6-9; Interpleader, 3; Justice's Court, 2.

CHARITIES. See Wills, 4-6.

CHATTEL MORTGAGE. See Mortgage, 25-30.

CLAIM AND DELIVERY. See Estoppel, 6.

CONSPIRACY. See Criminal Law, 20.

CONSTITUTIONAL LAW. See Aliens, 6; Contract, 4; Corporations, 1-4, 10; Insane Persons, 3; Mines and Mining, 4; Municipal Corporations; Office and Officers, 1-4; Photographic Reporter, 5, 6.

CONTRACT.

1. ACTION FOR BREACH OF CONTRACT—DISCHARGE FROM EMPLOYMENT AS TEACHER—EVIDENCE—EMPLOYMENT OF PREDECESSOR.—In an action against a board of education, and the members thereof, to recover as damages for the breach of an alleged contract of employment as teacher for a stated period at a fixed salary, the amount of salary which would have been received if plaintiff had not been discharged, evidence of the employment of plaintiff's predecessor at the same monthly salary, and of his continuing to act for one year, and of his resignation, and the choice of plaintiff as his successor, is irrelevant and immaterial, and does not tend to prove the contract alleged. (*Swafford v. Board of Education*, 484.)
2. GENERAL OFFER OF EVIDENCE.—Where an offer of evidence includes many different propositions grouped together, if the proof of any proposition is incompetent, irrelevant, or immaterial, the ruling of the court in rejecting the entire offer must be sustained. (*Id.*)
3. EVIDENCE OF SPECIAL MEETING OF BOARD—CHARGES OF UNPROFESSIONAL CONDUCT—GENERAL MOTION TO STRIKE OUT.—Evidence received of a special meeting of the board of education to investigate charges of unprofessional conduct against the plaintiff, prior to his discharge, is not reached by a general motion "to strike out the testimony thus far introduced, partially upon the ground that it appears that no notice had been given" to a certain member of the board of education. The motion is broad enough to include all the evidence in the case, and was correctly denied. (*Id.*)
4. CONSTITUTIONAL LAW—WAGERING CONTRACTS FOR STOCK—CONDITIONAL PAYMENT IN STOCK WITH GUARANTY.—The restriction of the constitution intended to prevent wagering contracts for the sale of stocks on margin, or to be delivered at a future day, will

CONTRACT. (Continued.)

not be extended by construction so as to forbid the delivery of stock as a conditional payment for the purchase of land, with a guaranty of cash value, and an agreement to take it back at the end of two years, upon request, and to make the payment in cash, in the absence of any proof that the contract was intended to effect a prohibited transaction, by evasion. (*Maurer v. King*, 114.)

See Assignment, 2; Counties; Estates of Deceased Persons, 33-35; Insurance, 4-6; Landlord and Tenant; Mechanic's Lien, 4-6; Statute of Frauds.

CONTRIBUTION. See Surety, 1-6.

CORPORATIONS.

1. **ACT OF 1897—LIENS OF LABORERS—CONSTITUTIONAL LAW.**—The act of March 29, 1897, regulating the contracts of corporations doing business in this state respecting the wages of their employees, and establishing liens upon all of the property of the corporation therefor, is special, discriminating, and arbitrary legislation against corporations doing business in this state, and in favor of laborers performing labor therefor, infringes the rights of persons to make and enforce their contracts, and denies to such corporations the equal protection of the laws, and is unconstitutional and void. (*Johnson v. Goodyear Mining Co.*, 4.)
2. **"CORPORATION" INCLUSIVE OF INDIVIDUALS—"PERSON"—CONSTRUCTION OF FOURTEENTH AMENDMENT.**—The word "corporation" in the act of 1897 means an artificial person created and existing under the laws of the place of its creation; but, as applied to its rights as a defendant, is to be treated as including all of the individuals who are members thereof. It is to be deemed a "person" within the meaning of the fourteenth amendment to the constitution of the United States, which forbids a state to "deny to any person within its jurisdiction the equal protection of the laws." (*Id.*)
3. **BASIS OF CLASSIFICATION—ARBITRARY SELECTION OF CORPORATION.**—Corporations cannot be made the basis of classification for purposes of legislation, unless such classification is founded upon some constitutional or natural distinction, which suggests a reason to justify the diversity of legislation respecting them. There is no reason to justify the arbitrary selection of corporations doing business in this state in order to subject their property to a lien not enforceable against other persons under like circumstances, and to prohibit them from making defenses which other persons may make, and requiring them to pay attorney's fees in an action at law from which other persons are exempt, and forbidding them and their employees to make contracts which other persons may make; and such

CORPORATIONS (Continued).

arbitrary selection cannot be justified by calling it classification. (Id.)

4. **POWER TO AMEND CHARTERS—PROTECTION OF CORPORATIONS.**—The power of the legislature to amend or repeal the charters of corporations organized in California does not authorize the legislature, while the corporation exists, to deprive it of the rights, guaranteed to it by the federal constitution, to due process of law and to the equal protection of the laws, nor has the legislature any power to alter, amend, or repeal the charters of foreign corporations doing business in this state. (Id.)
5. **LIABILITY OF STOCKHOLDERS—STATUTE OF LIMITATIONS—RENEWAL OF NOTES.**—The running of the statute of limitations in favor of the stockholders of a corporation upon their statutory liability to the creditors of the corporation cannot be interrupted by a renewal of the debt under which the liability was created, by taking up old notes of the corporation evidencing such liability, and giving new notes in lieu thereof. (Goodall v. Jack, 258.)
6. **SUPPORT OF FINDING AS TO RENEWAL OF NOTES—NOMINAL INTERVENTION OF THIRD PARTY.**—A finding that the new notes of the corporation were a renewal of the old notes is supported by evidence showing that, throughout the transaction, the negotiations for the taking up of the old notes to the plaintiffs, and the substitution of the new notes, were had between the corporation and the plaintiffs, and that the notes were made to a nominal third party who indorsed them to plaintiffs, and whose name was used under an arrangement for the exchange of checks, to give an appearance of payment of the old notes, no money having been really advanced by such third party or paid to the plaintiffs. (Id.)
7. **LIABILITY OF STOCKHOLDERS—PAYMENT OF NOTE BY SURETIES—CREATION OF NEW DEBT—STATUTE OF LIMITATIONS.**—The payment of the note of a corporation by sureties thereupon creates a new and distinct debt against the corporation and its stockholders, for reimbursement of the sureties; and the statute of limitations only begins to run against the sureties from the date of payment of the debt, and not from the date of the original obligation. (Ryland v. Commercial etc. Bank of San Jose, 525.)
8. **PAYMENT AFTER THREE YEARS.**—The payment of the note by the sureties after the lapse of three years from its date, while the note was not barred by the statute, cannot operate to relieve the stockholders of the corporation from liability to reimburse the sureties, for a payment made within three years before the commencement of the action, notwithstanding at the time of the payment no action could have been brought by the payee of the note against the stockholders. (Id.)

CORPORATIONS (Continued).

9. **ELECTION FOR DIRECTORS—QUALIFICATION OF VOTERS—REGISTRATION OF STOCK.**—The election of directors of all corporations having a capital stock, including mining corporations, is regulated by sections 307 and 312 of the Civil Code; and no person is qualified to vote at such an election unless he is a bona fide stockholder, having stock registered in his name on the stock-books of the corporation at least ten days prior to the election. (*Krause v. Durbrow*, 681.)

10. **ACT CONCERNING MINING CORPORATIONS—QUALIFICATION OF HOLDERS OF UNREGISTERED CERTIFICATE—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.**—There is no natural or inherent distinction between mining and other corporations for profit, or any peculiarity of the former, which will authorize special legislation for the mode of conducting the election of their directors; and section 3 of the act of 1890 for the further protection of stockholders in mining corporations, which authorizes the holders of indorsed certificates of stock therein to vote at the election of directors thereof, though the stock is not registered in their names upon the books of the corporation for a period of ten days, as required by section 312 of the Civil Code, is special legislation, in violation of section 25 of article XI of the constitution, the case being one in which a general law can be made applicable. (*Id.*)

11. **LIABILITY OF STOCKHOLDERS—INTEREST—PRESUMPTION.**—The stockholders of a corporation are liable for their proportion of the whole of the debt of the corporation, including the interest, which is as much a part of the debt as the principal; and a loan of money to the corporation is presumed to be upon interest, unless it is otherwise expressly stated at the time in writing. (*Wells, Fargo & Co. v. Enright*, 669.)

12. **INSOLVENCY—TRANSFER OF STOCK—LIABILITY FOR UNPAID SUBSCRIPTIONS—CREDITORS' BILL.**—In general, the law places no restriction upon the right of a stockholder to transfer his stock, so long as the corporation is solvent. But, after the corporation has become insolvent to the knowledge of the stockholder, he cannot, by transfer of his stock to an irresponsible person, escape liability for an unpaid subscription to stock, as against a creditor's bill to enforce such liability filed by the creditors of the insolvent corporation, who are entitled to have all such transfers canceled, and to have judgment entered against the transferrers. (*Welch v. Sargent*, 72.)

13. **FORMER JUDGMENT IN FAVOR OF CORPORATION—DEFENSE ADJUDICATED.**—A former judgment rendered in favor of the corporation, enforcing an unpaid installment and adjudging a defense pleaded thereto insufficient, is conclusive against the validity of the same defense when pleaded against the enforcement of other unpaid installments upon a creditor's bill to reach the assets of the insolvent corporation. (*Id.*)

CORPORATIONS (Continued).

14. **SEVERAL JUDGMENTS IN FAVOR OF CREDITORS**—The creditors appearing in the action, whether as plaintiffs or as intervenors, are entitled to have several judgments against each stockholder made a party to the action, to the extent of his indebtedness to the corporation. (Id.)
15. **ISSUE AS TO RELEASE BY ONE CREDITOR—OMISSIONS IN FINDINGS RENDERED IMMATERIAL**—Where the judgment rendered against a stockholder exceeded the amount due from him to the corporation, he is not prejudiced by an omission to find and to render judgment as to the amount due to another creditor holding collaterals of indeterminate value, or to find upon an issue as to whether such creditor had released such stockholder from further liability. (Id.)
16. **PRIVILEGE OF STOCKHOLDER TO PAY DEBT—DISCHARGE OF LIABILITY—CONSTRUCTION OF CODE—SUBSCRIPTION TO STOCK NOT INCLUDED**—The privilege given to a stockholder by section 322 of the Civil Code to pay a debt of the corporation in discharge of his liability only applies to his statutory liability to the creditors of the corporation, and does not apply to his liability upon an unpaid subscription to the stock, which is an asset of the corporation, and is payable to the corporation. (Id.)
17. **PAYMENT OF SUBSCRIPTION**—A stockholder may at any time pay to the corporation the amount of his unpaid subscription to its stock, in discharge of his liability thereupon. (Id.)
18. **VOLUNTARY PAYMENT OF DEBT OF INSOLVENT CORPORATION—UNAUTHORIZED PAYMENT OF SUBSCRIPTION**—A stockholder cannot take upon himself the authority of the corporation, and voluntarily pay his subscription to its stock to one creditor of the corporation in preference to other creditors, to their injury. Nor can he, by making such payment, without an agreement with the corporation, acquire a right to have it entered upon the books of the corporation as a payment upon his subscription, or to defend a creditors' bill to enforce the payment of the subscription. (Id.)
19. **PREFERENCE OF CREDITOR BY CORPORATION—COLLATERALS HELD BY BANK—ADJUSTMENT UPON CREDITORS' BILL**—A corporation may prefer one of its creditors; and a bank, which has received collateral securities for the debt of the corporation to it, in the due course of business, and in good faith, without taint of fraud, is not bound, upon a creditors' bill to reach assets of the insolvent corporation, to surrender its securities for the benefit of other creditors. The other creditors may compel the bank first to exhaust its securities, and to share ratably with them only for the balance of the debt remaining unpaid thereafter. (Id.)
20. **PAYMENTS BY INDORSERS OF CORPORATION NOTE—SHARE IN ASSETS**—The indorsers of a note of the corporation, to the extent of any payments made by them, stand in the relation of ordinary creditors of the corporation, and may share ratably in the assets of the corporation. (Id.)

CORPORATIONS (Continued).

21. **CREDITORS' BILL—RIGHTS OF CREDITORS—RECEIVER—RATABLE DISTRIBUTION OF FUND.**—A creditors' bill may be filed against one or any number of the stockholders of an insolvent corporation to compel payment of their unpaid subscriptions to stock. Ordinarily, such a bill is brought for the benefit of all the creditors who may choose to come in, and the court will, without the formality of a call not made by the corporation, order the payments to be made to a receiver for the benefit of the creditors, and the fund realized therefrom is distributed ratably among the creditors. (Id.)
22. **INTERLOCUTORY DECREE—FINDINGS AS TO CORPORATE DEBT—UNASCERTAINED LIABILITY.**—Where the decree appealed from is in its nature interlocutory and not final, and is sustained by a proper finding that the debts of the corporation were largely in excess of all the unpaid subscriptions to its stock, the fact that the exact liability upon the balance of an indorsed note held by a bank subject to the application of collateral securities in reduction thereof, upon which note appellants were indorsers, was not and could not be ascertained by the interlocutory decree, is not ground for its reversal. (Id.)
23. **SUBSCRIPTION BY DECEASED PERSONS—FORM OF JUDGMENT.**—Where the claims of creditors of the insolvent corporation were presented against the estate of a deceased subscriber to the stock of the corporation, a judgment under the creditors' bill that the administration do pay the amount of the subscription in due course of administration to a receiver appointed by the court, to be subject to the further order of the court, is proper in form. (Id.)

See Banks; Criminal Law, 5-7; Findings, 1; Irrigation Districts; Mines and Mining; Mortgages, 15-24; Municipal Corporations; Receiver; Summons, 2.

COSTS. See Election, 8; Interpleader, 3.

COURTS. See Justice's Court.

CREDITOR'S BILL. See Corporations, 12-23.

CRIMINAL LAW.

1. **ARSON—INTENT TO DESTROY—INSUFFICIENT INFORMATION.**—Under section 447 of the Penal Code defining the crime of arson as "the willful and malicious burning of a building with intent to destroy it," the specific intent to destroy the building is an essential ingredient of the offense, and must appear distinctly in the averments of the information, in addition to the averments of willful and malicious burning. An information which merely avers generally that the defendant "did willfully, unlawfully, feloniously, and maliciously set fire to and cause to be burned a certain building," is in-

CRIMINAL LAW (Continued).

sufficient to charge the crime of arson. (*People v. Mooney*, 339.)

2. **EVIDENCE—SEARCH IN CONNECTION WITH DISTINCT CRIME—BURGLARY.**—On a trial for burglary, in which evidence for the prosecution had been given that a certain revolver, found in the possession of the defendant, was one of the articles alleged to have been stolen, but which the defendant testified was his property and had been in his possession for a long time previous to the alleged crime, it is improper, in rebuttal, to ask a witness for the prosecution, who had found the revolver while searching the person and trunk of the defendant, how he came to make such search, and for the witness to answer that the search was made in connection with another burglary which the defendant was suspected of having committed. (*People v. Valliere*, 65.)
3. **IMPROPER CONDUCT OF DISTRICT ATTORNEY.**—Upon such answer being ruled out, it is error justifying a new trial for the district attorney, in his argument to the jury, to refer to such search as having been made for such other burglary, and that he knew of the same to his own knowledge. (*Id.*)
4. **TRIAL FOR FELONY—ABSENCE OF JUDGE FROM COURTROOM.**—There can be no court without the presence of the judge, who is a component part of the court; and the absence of the judge from the courtroom during any part of the trial of a defendant for a felony, though he may be within hearing of the courtroom, is prejudicial error entitling the accused to a new trial. (*People v. Blackman*, 248.)
5. **EMBEZZLEMENT BY SECRETARY OF CORPORATION—EVIDENCE—BOOKS OF CORPORATION.**—Upon a charge of embezzlement against the defendant, who was secretary of a corporation, the books of the corporation, showing a shortage, kept by a bookkeeper who committed suicide about the time when the shortage was discovered, are not admissible against the defendant, without proof that he knew their contents, and was responsible for their condition. (*Id.*)
6. **NEGLECT OF DUTY AS SECRETARY—PRESUMPTION.**—No mere neglect of the duty of the defendant as secretary to examine the books of the corporation can sustain a charge of embezzlement, and the presumption of innocence will overcome all presumptions of knowledge or control of the secretary over the books. (*Id.*)
7. **BOOKS OF COLLECTORS AND OF BANK.**—Books of the collectors for the corporation, and of a bank in which deposits were made, not proven to be correct by those who kept them, are inadmissible against the secretary of the corporation, who is charged with embezzlement; and, if ordered to show that the defendant did not keep correct books, the presumption of correctness is destroyed, and they cannot be received as admissions without proof of his knowledge and complicity in falsifying the books. (*Id.*)

CRIMINAL LAW (Continued).

8. **CONVICTION OF EMBEZZLEMENT—PROBABLE CAUSE FOR APPEAL—ILLNESS OF DEFENDANT—HABEAS CORPUS—ADMISSION TO BAIL.**—Where probable cause appears for an appeal from a judgment of conviction of embezzlement, the affidavits of reputable physicians, including the affidavit of one physician agreed upon by the district attorney and the defendant, showing that his ill-health is such that confinement in jail pending the appeal would endanger his life, the circumstances are of such an extraordinary character that it is a proper exercise of discretion upon *habeas corpus* to admit the defendant to bail pending the appeal. (In re Ward, 489.)
9. **EXTORTION—CONTROLLING CAUSE—CONSTRUCTION OF CODE.**—Section 518 of the Penal Code, defining the crime of extortion, and providing that "the crime is only committed when the property is obtained with the consent of the owner, and this consent must be induced by an unlawful use of force or fear," can only mean that the unlawful use of force or fear must be the operating or controlling cause which produces the consent. (People v. Williams, 212.)
10. **ERRONEOUS INSTRUCTIONS—FEAR AS A PARTIAL CAUSE—PREJUDICIAL ERROR.**—Instructions to the effect that the crime was committed if the fear of the prosecuting witness, induced by the threats of the defendants, entered to any extent whatever into the parting by him with his money are erroneous; and, where the evidence is such as specially called for correct instructions upon the subject of controlling cause, the error in giving such incorrect instructions is prejudicial, and is not cured or neutralized by other correct instructions as to the elements constituting the crime of extortion. (Id.)
11. **EVIDENCE—DECLARATION OF CODEFENDANT AS TO OTHER PROPOSED OFFENSES.**—The declaration of a codefendant as to other proposed offenses, entirely distinct from the offense in controversy, is inadmissible; and the refusal of the court to strike it out is prejudicial error. (Id.)
12. **UNEXPECTED ANSWER—OBJECTION TO QUESTION—MOTION TO STRIKE OUT.**—When an unexpected answer of a witness, which could not be anticipated by objection to the question, contains inadmissible and prejudicial matter, a motion to strike it out is the proper remedy. When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late; unless preceded by an objection to the question, but the rule is otherwise when the answer may or may not be admissible. (Id.)
13. **IMMORAL CONDUCT OF DEFENDANTS.**—Evidence of the immoral conduct of the defendants as between themselves prior to the commission of the crime charged in no way tends to indicate the commission of the crime alleged, and is inadmissible. (Id.)

CRIMINAL LAW (Continued).

14. **OBTAINING MONEY UNDER FALSE PRETENSES—LARCENY—REVIEW UPON APPEAL.**—Where the evidence upon a charge of obtaining money under false pretenses fails of proof thereof, and it is conceded by the attorney general that the evidence indicates that the only offense committed was that of larceny, the judgment of conviction must be reversed; and as the case cannot be tried again upon the charge made, the court will not, upon the appeal, determine moot questions of law. (*People v. Lewis*, 207.)
15. **LARCENY—FALSE PRETENSES—TITLE—POSSESSION—SPECIAL PROPERTY—FELONIOUS INTENT.**—It is essential to the crime of larceny that the title to the stolen property shall not have been parted with. If the title has been obtained by fraud or deceit, the crime is that of obtaining goods under false pretenses, and not larceny; but if the transfer be of possession merely, or of some special property by way of pledge or bailment, which has been secured by fraud, with a present felonious intent to convert the property so acquired, the offense is larceny. (*People v. Campbell*, 278.)
16. **SUFFICIENCY OF EVIDENCE—FRAUDULENT PERSONATION—PARTIAL LOAN—PRETENDED BAILMENT AND SECURITY.**—Where the evidence showed that the money of the prosecuting witness was fraudulently obtained through a false personation by the defendant of membership in a responsible house which was represented as about to employ the prosecuting witness as a collector, and as requiring a deposit from him by way of security; and the jury might infer from the evidence that part of the money was obtained by way of loan, and that as to the residue the title remained in the prosecuting witness, and the defendant was a mere bailee thereof, charged with the duty of depositing the funds, and taking a certificate of deposit in the name of the prosecuting witness, and that defendant intended when he acquired possession to convert the money to his own use, the crime of larceny was established as to the residue so obtained, and a verdict of conviction of larceny by the jury must be sustained. (*Id.*)
17. **CONSTRUCTION OF CODE—SPECIAL PROSECUTION.**—Where the evidence is sufficient to establish the crime of larceny, the defendant may be prosecuted generally therefor, and need not be specially prosecuted either for the results of false personation under section 530 of the Penal Code, or for obtaining property by false pretenses, under section 532 of the same code, although the facts might admit of a prosecution under either of those sections. (*Id.*)
18. **FORGERY—INSUFFICIENT INDICTMENT.**—An indictment charging the forgery of a mortgage, which does not state facts showing that the mortgage could have injured or defrauded anyone, or that it was given to secure an indebtedness or other obligation, or that it purported to be a valid writing obligatory, is insufficient to show the existence of any crime. (*People v. Terrill*, 99.)

CRIMINAL LAW (Continued).

19. **PRESUMPTIONS—AID OF INDICTMENT.**—The presumptions are all in favor of the innocence of the accused, and in no case can an indictment be aided by imagination or presumption. If the facts stated may or may not constitute a crime, the presumption is that no crime is charged. (Id.)
20. **GRAND LARCENY—CONSPIRACY—EVIDENCE.**—Upon the trial of a defendant charged with grand larceny, which appears to have been committed by aiding and abetting another person in taking the stolen property from the person of the prosecuting witness, it is necessary for the prosecution to show that the two were co-conspirators in the commission of the crime; and evidence that they were seen frequently together is not irrelevant to that issue. (*People v. Childs*, 363.)
21. **POSSESSION OF STOLEN GOODS—INSTRUCTION—INAPT EXPRESSION NOT PREJUDICIAL.**—An instruction to the effect that the mere possession of stolen goods by the defendant is not sufficient of itself alone to justify his conviction, but that "if there is any other evidence tending to show guilt, taken in connection with the possession of the stolen property, the rule is different," though concluding with an inapt and somewhat ambiguous expression, would be naturally understood by the jury as importing in its conclusion that there might be other evidence which, taken in connection with the circumstance of the possession of stolen property, would be sufficient to convict; and where the charge to the jury was on the whole correct, and favorable to the defendant, the inapt expression, "the rule is different," could not have influenced the jury prejudicially. (Id.)
22. **LARCENY—INTENT TO STEAL—EMBEZZLEMENT.**—One who obtained the money of the wife of another person with the intent from the beginning to steal it, under the false pretense that it was to be paid to others who could secure an appointment on the police force for her husband, and that it was to be returned to her if the appointment was not secured, and who gave his note therefor, and promised to have it indorsed by the others, is not guilty of embezzlement. (*People v. De Graaff*, 676.)
23. **FALSE PRETENSES—PARTING WITH TITLE—QUESTION OF FACT.**—The question whether the crime was that of larceny or the obtaining of money under false pretenses, depends upon the question of fact whether the owner of the money, at the time of parting with the possession of it, intended to part with the title thereto. If she did not intend to part with the title, but merely gave it to the defendant, to be applied to a special purpose, if opportunity offered, otherwise to be returned to her, and in no event to be used by the defendant for his own purposes, the offense of taking it, by the defendant, with intent to steal it, is larceny and not the obtaining of money under false pretenses. (Id.)

CRIMINAL LAW (Continued).

24. **PROPRIETY OF INSTRUCTIONS—MANNER OF JUDGE.**—The propriety of the instructions given by the judge can only be determined from their contents, and the manner of the judge in giving them cannot be considered upon appeal, unless misconduct is made to appear in some mode provided by the code. (Id.)
25. **ERRONEOUS MODIFICATION OF INSTRUCTION—HARMLESS ERROR.**—An erroneous modification of a correct instruction asked by the defendant by inserting a negative which made the instruction absurd, and which was equivalent to a refusal to give the instruction, is harmless error, where it appears that the whole substance of the instruction as requested was repeatedly given in the charge of the court. (Id.)
26. **HOMICIDE—CONFESSED ERROR IN INSTRUCTIONS—UNAUTHENTICATED REQUESTS OF DEFENDANT.**—Where the attorney general has confessed manifest error in the instructions given to the jury upon the trial of a defendant accused of murder, the effect of the error cannot be overcome by filing certified copies of requests for instructions by the defendant, suggested to contain similar error, where the alleged requests are not authenticated as such in any manner that would entitle them to be considered as part of the record. (People v. Cole, 545.)
27. **TRANSCRIPT UPON APPEAL—IMPROPER DUPLICATION OF INSTRUCTIONS.**—Where the instructions are properly authenticated so as to be part of the judgment-roll, they ought not to be duplicated by insertion in a bill of exceptions. There should be only one insertion in the record of instructions properly authenticated. (Id.)
28. **CONVICTION FOR MURDER—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.**—Where there are circumstances in evidence indicative of the guilt of the defendant, and others of an opposite tendency, and the opinions of the medical witnesses were conflicting, the question of the guilt or innocence of the defendant is for the jury to determine. (Id.)
29. **MOTION TO SET ASIDE INFORMATION—COMPLAINT BY DISTRICT ATTORNEY—CURE OF DEFECT.**—A motion will not lie to set aside the information for murder after the defendant has been held to answer as the result of a preliminary examination, on the ground that the district attorney who filed the complaint, had no personal knowledge of the facts of the homicide. Any imperfections in the complaint are cured, where the evidence taken by the magistrate warrants an order holding the defendant to answer. (Id.)
30. **MOTION IN ARREST OF JUDGMENT.**—A motion in arrest of judgment can only be made for defects appearing upon the face of the indictment or information. (Id.)
31. **IMPROPER CROSS-EXAMINATION BY DISTRICT ATTORNEY.**—The cross-examination of a witness for the defendant who had made previous

CRIMINAL LAW (Continued).

statements to the district attorney in conflict with the testimony given, must be confined to the question of such conflict on material points; and it is error for the court to permit the district attorney to read portions of the statement made to him, having no relation to the testimony given, and to cross-examine the witness thereon, to the prejudice of the defendant. (Id.)

32. **HOMICIDE—SELF-DEFENSE—REVIEW OF EVIDENCE.**—A verdict of guilty of manslaughter cannot be reversed upon appeal, upon the ground that the evidence shows that the homicide was committed in self-defense, where the evidence as to self-defense appears to be conflicting, and the appellate court cannot say, upon a review of the evidence, taking the testimony of the defendant together with the general facts proved, that the jury were not warranted in finding that the homicide was not committed in self-defense. (*People v. Soap*, 408.)

33. **EVIDENCE—RECOLLECTION OF WITNESS—USE OF WORD "PRESUME."**—A witness in stating facts within his knowledge or personal observation, is not required to testify with that certainty which excludes all doubt, and the use of the word "presume" by the witness is not ground for striking out his evidence, when, as used by him, it evidently meant nothing more than a statement of his best recollection as to particulars of a fact observed. (Id.)

34. **MISCONDUCT OF JURY—AFFIDAVIT OF JUROR—MISREPRESENTATION AS TO PUNISHMENT FOR MANSLAUGHTER.**—An affidavit of a juror cannot be received to impeach the verdict by setting forth a misrepresentation made by a juror as to the limit of punishment which could be inflicted for manslaughter, by which many jurors were induced to agree upon a verdict of guilty of that offense. (Id.)

35. **NEWLY DISCOVERED EVIDENCE—DILIGENCE.**—A new trial cannot be granted for newly discovered evidence which is of slight importance, and in respect to which no diligence was shown in seeking to discover it before the trial. (Id.)

36. **HOMICIDE—EVIDENCE—CONDITION OF POCKET OF DECEASED—MOTIVE.**—Upon the trial of a person accused of murder, evidence is admissible to show the condition of the body of the deceased immediately after the homicide, and that the pocket of the deceased, containing a purse with change in it, was partly turned inside out. The fact that the evidence might tend to show that the motive of the homicide was robbery does not render it inadmissible as tending to show a distinct crime. (*People v. Gleason*, 323.)

37. **ATTACK OF DECEASED—CROSS-EXAMINATION OF DEFENDANT—FACT OF DISTANCE—OPINION.**—Where the defendant had testified that he feared an attack from the deceased with a knife, a question upon cross-examination, based upon the fact of distance testified to by

CRIMINAL LAW (Continued).

him, as to how the deceased could reach him with the lunge of a knife after stepping up two or three feet from a distance of ten or twelve feet, is not objectionable as improperly asking for the opinion of the witness. (Id.)

38. **MISCONDUCT OF DISTRICT ATTORNEY—OPENING STATEMENT—UNPROVED FACTS.**—The district attorney is not guilty of misconduct for merely including in his opening statement facts expected to be proved, some of which remained unproved, where there is nothing to indicate an intentional disregard of truth, or clear intent to influence the jury by false statements. (Id.)
39. **INSTRUCTION—INCOMPLETE STATEMENT AS TO IMPEACHMENT—INCORRECT PRESUMPTION.**—An instruction requested for the defendant, which, so far as correct, consists of commonplace matters well known to the jury, and which contains an incomplete statement of the manner by which the defendant may be impeached, and an incorrect presumption of law as to the good character of the defendant as a witness, in the absence of one kind of impeaching testimony, is properly refused. (Id.)
40. **HOMICIDE—INSANITY—EVIDENCE.**—Upon the trial of a defendant charged with murder, where the sole defense is insanity, evidence of the declarations and acts of the defendant indicating that he was in fear of great peril of his life, not offered for the purpose of showing that he had any delusions upon that subject, are incompetent and immaterial to the issue of insanity. (People v. Ellsworth, 595.)
41. **PLEADING—NAME OF DEFENDANT—IMMATERIAL OMISSION OF "JR."**—An information entitled and indorsed in the name of the people against "F. O. Jr.," which in the charging part avers that "the said F. O." committed the offense charged, and concludes that "all of the acts of the said F. O., Jr., were and are contrary to the statute," etc., sufficiently shows that the defendant was charged by the name of "F. O., Jr.," which he declared to be his true name; and there is no defect in the charging part of the information affecting a substantial right of the defendant. (People v. Oliveria, 377.)
42. **JUNIOR AND SENIOR NO PART OF NAME.**—Junior and senior are no part of a name, however commonly employed; and neither the omission nor the insertion of either, contrary to what would be deemed proper, will create a variance or otherwise injure the indictment or information. (Id.)
43. **IMPANELMENT OF JURY—WITHDRAWAL OF NAMES BY CONSENT—SPECIAL VENIRE—WAIVER OF OBJECTION—CHALLENGE TO SWORN PANEL.**—Where the names of six jurors engaged in another trial were withdrawn from the jury-box by consent of the defendant, and after the remainder of the names were exhausted without completing the panel a special venire was summoned, and the jury completed and sworn, without any statutory challenge having been interposed to the special venire, a challenge subsequently made to the

CRIMINAL LAW (Continued).

sworn panel by the defendant, on the ground stated "that there were not in the box at the commencement of the drawing, or at any time during the drawing, the full number of names that should be there during the drawing," was properly denied. (Id.)

44. **TIME FOR CHALLENGE TO PANEL.**—A challenge to the panel must be taken before a juror is sworn. (Id.)
45. **ROBBERY—EVIDENCE—IDENTIFICATION OF DEFENDANT—STANDING UP FOR COMPARISON.**—Upon a charge of robbery, where the prosecuting witness described the size of the party robbing him, it is not error for the court to overrule an objection to a request of the district attorney that the defendant should stand up for comparison. It would not be error for the court to compel the defendant to stand up for comparison. (Id.)
46. **CONFESSIONS OF DEFENDANT—EVIDENCE OF VOLUNTARINESS—CONFLICTING EVIDENCE OF DEFENDANT.**—The confessions of the defendant are admissible for the prosecution, if the evidence for the prosecution shows that they were free and voluntary, and not made under the influence of any threats, intimidations, promises, or inducements of any kind. The fact that the evidence of the defendant conflicts with that for the prosecution cannot justify the exclusion of the evidence of his confessions; but the jury, under proper instructions, are the sole judges of the credibility of the witnesses in regard to the matter. (Id.)
47. **DRUNKENNESS OF THE DEFENDANT—INSTRUCTIONS—ABSENCE OF REQUEST.**—Where there was evidence indicating that the defendant was drunk at the time of the commission of the offense, and no error is alleged in the instructions given on that subject, the defendant cannot object that further instructions were not given in relation thereto, in the absence of a request made therefor by the defendant. (Id.)
48. **REPROVING REMARKS BY JUDGE TO DEFENDANT'S COUNSEL.**—Reproving remarks by the judge to the defendant's counsel, though not courteously addressed, are not reversible error, where the manner of the counsel in asking and repeating many immaterial questions merited some rebuke, and tried the patience of the judge. (Id.)
49. **ROBBERY—SUFFICIENCY OF EVIDENCE—CORROBORATION OF DEFENDANT—PROVINCE OF JURY.**—Upon a trial for robbery, where the testimony of the prosecuting witness, if believed by the jury, is sufficient to sustain a conviction, the fact that the testimony of the defendant, in conflict with that of the prosecuting witness, is corroborated by another witness, it is not ground for setting aside the verdict. The jury are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds against a less number, or against a presumption or other evidence satisfying to their minds. (People v. Sternberg. 511.)

CRIMINAL LAW (Continued).

50. **MODIFICATION OF REQUESTED INSTRUCTION—DANGER CONNECTED WITH VERDICT—MATTER OF COMMON KNOWLEDGE.**—Where the testimony as to the robbery was direct and not circumstantial, a requested instruction that the jury must consider that innocent persons have been convicted, and consider the danger of convicting an innocent person in weighing the testimony to determine whether there is a reasonable doubt, is not improperly modified by adding that they must also consider that guilty persons have been sometimes acquitted, and consider the danger to society of acquitting a guilty person. The instruction and the modification do not constitute propositions of law, but merely direct the jury to consider matter of common knowledge. (Id.)
51. **INSTRUCTION AS TO DISTRUST OF FALSE WITNESS—EXPLANATORY REMARKS.**—An instruction upon the subject of the distrusting of a witness in other parts of his testimony, who is false in one part thereof, is not made erroneous by explanatory remarks as to what is meant by the rule, where there is nothing in such remarks contrary to law or prejudicial to the defendant. (Id.)
52. **ABORTION—EVIDENCE—DYING DECLARATIONS—BELIEF OF IMPENDING DEATH NOT SHOWN.**—Dying declarations in reference to the commission of the crime of abortion, leading to the death of the declarant, are not admissible against a defendant charged with the abortion, where the circumstances surrounding the declarations, the condition of the declarant, and the testimony of the attending physician render it doubtful whether the declarant believed that the hand of death was laid upon her, and her conduct in failing to make any preparations for death seemed to indicate the contrary. Dying declarations are not admissible if the declarant had the slightest hope of recovery, and if it is not plainly manifest that they were made under a belief of impending death. (People v. Fuhrig, 412.)
53. **INTRODUCTION WRITTEN BY STENOGRAPHER WITHOUT REQUEST—RATIFICATION NOT DISTINCTLY SHOWN.**—An introductory statement declaring a knowledge of impending death, written by the stenographer who took the evidence, without a previous statement of such knowledge by the declarant, or a request that it be written, is not shown to be distinctly ratified by a mere general assent to a long document embodying the statement after a single reading of it as a whole by the stenographer, and the signing of it by the declarant, especially where the circumstances are such as to indicate that a belief of impending death was not then manifestly in the mind of the declarant. (Id.)
54. **PROSECUTION FOR CUTTING "TELEGRAPH" WIRES—"TELEPHONE"—CONSTRUCTION OF PENAL CODE.**—A "telephone" is included within the meaning of the word "telegraph," as used in section 591 of the Penal Code, forbidding the removal or obstruction of any line of telegraph or the severing of any wire thereof; and a criminal

CRIMINAL LAW (Continued).

prosecution will lie under that section for the cutting or destruction of telephone wires. (*Davis v. Pacific T. & T. Co.*, 312.)

55. **STRICT CONSTRUCTION OF PENAL STATUTES—COMMON-LAW RULE INAPPLICABLE.**—The rule of the common law that penal statutes are to be strictly construed has no application to the construction of the Penal Code, which is regulated by section 4 of that Code. (*Id.*)
56. **EVIDENCE—DEPOSITION TAKEN ON PRELIMINARY EXAMINATION—AUTHENTICATION.**—The authentication of the deposition of a witness given on the preliminary examination of the defendant accused of a felony, by a certificate of the stenographer who took the testimony, stating that it is "a true and correct transcript from the shorthand notes taken by me, and a full and complete record of the proceedings had and testimony given in the above entitled case," though careless in not following the language of the statute, is in substantial compliance therewith, and includes in the meaning of the certificate "a correct statement of such testimony and proceedings in the case," as required by section 869 of the Penal Code. (*People v. McIntyre*, 423.)
57. **COMPARISON OF TRANSCRIPT WITH SHORTHAND NOTES—VARIANCE PRESUMED HARMLESS—ABSENCE OF EVIDENCE.**—A discrepancy between the shorthand notes and the transcript, principally in the matter of punctuation, causing a dispute whether the prosecuting witness had said that he went to bed or got up "at 7 o'clock," is presumed harmless, in the absence of any evidence in the record upon appeal showing the materiality of the variance. If the variance was in fact material, the defendant should have embodied enough of the evidence in the record to show its materiality. (*Id.*)
58. **APPOINTMENT OF SHORTHAND REPORTER BY MAGISTRATE—QUALIFICATIONS—CONSTRUCTION OF CODE.**—Section 869 of the Penal Code, authorizing the magistrate at a preliminary examination to appoint a shorthand reporter, only requires that he be competent to do the work; and that section is not to be construed as requiring the same qualifications prescribed for official reporters of the superior courts in chapter III, title IV, of the Code of Civil Procedure. (*Id.*)
59. **WAIVER OF OBJECTION TO COMPETENCY OF APPOINTEE—PRESUMPTION—IMMATERIAL QUESTION AT TRIAL.**—When the defendant had an attorney present at the preliminary examination, who then made no objection to the competency of the shorthand reporter appointed by the magistrate, objection thereto is waived; and it must be presumed at the trial that the appointee was satisfactory to the court and to the defendant. A question asked of the reporter at the trial, whether a committee had been appointed to

CRIMINAL LAW (Continued).

examine him, is properly disallowed as immaterial. (Id.)

60. **ABSENCE OF WITNESS FROM STATE—SUFFICIENCY OF SHOWING.**—The testimony of the officer requested to serve a subpoena for a prosecuting witness, to the effect that, after following every clew of inquiry, he was informed by various persons acquainted with the witness that he had left the state, and that it could not be told when he would return, though it was said by one person that he was liable to return upon business at any time, but that, after further efforts to locate the witness, the officer could not find him, is a sufficient showing to justify the admission in evidence of the deposition of the witness taken at the preliminary examination. (Id.)
61. **INDICTMENT—INDORSEMENT OF NAMES OF WITNESSES—OBJECT OF REQUIREMENT.**—The purpose of the requirement of the law that the names of the witnesses examined by the grand jury shall be indorsed upon the indictment, is to inform both the people and the defendant of the names of the witnesses upon whose testimony the indictment is based, and to give them both an opportunity to secure their attendance at the trial. (People v. Quinn, 542.)
62. **USE OF SURNAME OF WITNESS—KNOWLEDGE OF DEFENDANT—HARMLESS IRREGULARITY.**—An irregularity in indorsing the mere surname of a witness upon the indictment, without giving his Christian name, is harmless, if the defendant, immediately after the finding of the indictment, knew the particular person so named upon the indictment. (Id.)
63. **REQUESTED INSTRUCTIONS INCLUDED IN CHARGE.**—When all matters material and legally sound in instructions requested by the defendant were given by the court in its charge to the jury, it is not error to refuse such instructions. (Id.)
64. **TRIAL AFTER SIXTY DAYS—DISMISSAL—WAIVER BY DEFENDANT.**—No duty is incumbent on the court to order the dismissal of a criminal charge under section 1382 of the Penal Code, on the ground that a defendant whose trial has not been postponed upon his application is not brought to trial within sixty days after the finding of an indictment, or the filing of an information, unless the defendant demands such dismissal. The right of the defendant to demand such dismissal may be waived by him, and is waived, where the defendant is brought to trial by the impaneling and swearing of a jury to try the case, without previous objection that the sixty day limit had expired. (People v. Hawkins, 372.)
65. **IMPANELING OF JURY PART OF TRIAL—JEOPARDY.**—The impaneling of the jury is a part of the trial, and the defendant is on trial, and his legal jeopardy attaches, when the jury has been impaneled and sworn to try the case; and he cannot then object for the first time that the trial is too late. (Id.)

CRIMINAL LAW (Continued).

66. **ASSAULT WITH DEADLY WEAPON—EVIDENCE—ATTEMPT AT VIOLENCE—QUESTION FOR JURY.**—Where the evidence tends to indicate an attempt at violence by the defendant in the use of a deadly weapon, the question is properly left to the jury, and its verdict of guilty of an assault with a deadly weapon will not be disturbed upon appeal. (Id.)
67. **RESISTANCE OF ARREST.**—Where it is clear that the defendant knew that an officer, called in for the purpose of arrest, shortly after the assault, intended to arrest him, although the officer did not in words inform him of such intention, evidence that the defendant, with force and arms, resisted the arrest is admissible for the prosecution. (Id.)
68. **ASSAULT WITH INTENT TO MURDER—HARMLESS OMISSION IN REQUESTED INSTRUCTION—ACQUITTAL OF CHARGE.**—Where a defendant charged with an assault with intent to murder was convicted of an assault with a deadly weapon, and thereby acquitted of the charge of an intent to murder, any alleged error in omitting part of a requested instruction upon that charge is harmless, and cannot have prejudiced the defendant. (Id.)
69. **EVIDENCE—DEPOSITIONS TAKEN AT PRELIMINARY EXAMINATION—FILING OF ORIGINAL NOTES.**—Upon the trial of a defendant under a charge of felony, in the superior court, the deposition of a witness taken at the preliminary examination and contained in the transcript of the notes of the official reporter, cannot be objected to as evidence after proof of the death of the witness, upon the ground that it has not been first affirmatively shown that the stenographic reporter had filed his original notes with the county clerk as required by subdivision 5 of section 869 of the Penal Code. (People v. Esabe, 243.)
70. **ABSENCE OF FILING OF NOTES—CURE OF IRREGULARITY.**—The fact that the notes were not filed in fact when the deposition was admitted is without prejudice to the defendant, as an irregularity, where it appears that the notes were actually filed with the county clerk before the conclusion of the trial. (Id.)
71. **CONFESSIONS—PROOF OF VOLUNTARINESS.**—The confessions of the defendant are admissible, if proved to have been freely and voluntarily given, and made without duress, or inducement, or promise. (Id.)

See Jury and Jurors.

COUNTIES.

1. **ACTION BY COUNTY—MONEY PAID FOR BRIDGE—GOOD FAITH—INVALID CONTRACT.**—An action cannot be maintained by a county to recover back money paid under a contract entered into in good faith and in accordance with the advice of its law officer, for the construction of a railroad bridge across a river separating it from another county, with a separate overhead roadway, to be kept in

COUNTIES (Continued).

order by the railroad company for free public highway purposes, the construction of which was completed and enjoyed by the public, notwithstanding the contract may be invalid, for want of compliance with the requirements of the law. (*County of Sacramento v. Southern Pacific Co.*, 217.)

2. **EQUITABLE ESTOPPEL OF COUNTY—BENEFIT UNDER EQUITABLE CONTRACT LEGALLY DEFECTIVE.**—A county, state, or municipality may be equitably estopped by its acts, in the same manner as an individual, when acting within the general scope of its powers. A county paying money for a bridge to be used for highway purposes, which has been completed, and of which the county enjoys the benefit, is estopped to maintain an action to recover the money, if the contract, under which it was paid, though legally defective, was not immoral, inequitable, or unjust. (*Id.*)
3. **CONSTRUCTION OF COUNTY GOVERNMENT ACT—RECOVERY OF MONEY ILLEGALLY PAID—EQUITABLE ESTOPPEL—GENERAL POWERS OF SUPERVISORS.**—Section 8 of the County Government Act, providing for the recovery of money paid by order of the supervisors "without authority of law," only applies to payments which the board has no general power to make, and does not affect the principle of equitable estoppel as applied to payments made within the scope of the general powers of the board, and by virtue of which it has acquired a benefit, or an interest of which it retains the enjoyment. (*Id.*)
4. **GENERAL POWER OVER BRIDGES.**—A board of supervisors has general power to construct, buy, or rent a bridge, or to purchase an exclusive right of way over a bridge, and may be equitably estopped to recover back money paid therefor, which has secured to it a benefit, though the forms of law were not complied with in making the contract under which it was paid. (*Id.*)

DAMAGES. See Appeal, 1; Justice's Court, 3.

DEBTOR AND CREDITOR. See Corporations, 12-23; Insolvency.

DEED. See Insurance, 1-3, 7; Mortgage, 10, 11, 33-36.

ELECTION.

1. **ELIGIBILITY OF SUPERVISOR—"ELECTOR"—CHANGE OF RESIDENCE—REGISTRATION.**—A person elected supervisor in a district to which he had changed his residence from another district more than one year prior to the election, and who, during that period and at the time of the election, was an "elector" of that district, as defined in section 1 of article II of the constitution, was eligible for the office in that district, under section 15 of the County Government Act of April 1, 1897, notwithstanding he did not change his registration from the precinct of his former residence

ELECTION (Continued).

until a little more than thirty days prior to the election. (*Bergevin v. Curtz*, 86.)

2. **REGISTRATION NOT A QUALIFICATION OF AN ELECTOR.**—Registration is not a "qualification" of an elector, and cannot add to the qualifications fixed by the constitution; but it is to be regarded as a reasonable regulation by the legislature for the purpose of ascertaining who are qualified electors, and of having their names enrolled upon an authentic list, in order to prevent illegal voting. (*Id.*)
3. **ELIGIBILITY NOT INCLUSIVE OF REGISTRATION.**—An elector may be eligible to the office for which he was elected, though his name may not be upon the great register, and though for that reason he could not have voted at the election. (*Id.*)
4. **"ELECTOR" AND "VOTER"—DISTINCTION AS TO QUALIFICATIONS.**—The constitutional qualifications of an elector are not the same thing as the legal qualifications of a voter. The voter is the elector who votes; and an elector may not be legally qualified to vote. (*Id.*)
5. **CONSTRUCTION OF CODE—"QUALIFIED ELECTOR"—"REGISTRATION."**—Section 1083 of the Political Code, assuming to define who "shall be a qualified elector," which adds to the constitutional qualifications that of enrollment upon the great register of the county fifteen days prior to the election, must be construed to use the words "qualified elector" in the sense of an elector who has the right to vote. (*Id.*)
6. **VALIDITY OF BALLOTS—EXCESS OF NAMES VOTED FOR—IDENTIFYING MARK.**—Ballots cast for an excessive number of names for one office have only the effect, under section 1211 of the Political Code, to prevent the ballots from being counted for that office; and such excessive number of votes for one office does not constitute an identifying mark within the meaning of section 1215 of the same code, and does not destroy the validity of the ballot, or affect it in so far as properly cast for candidates for other offices. (*Day v. Dunning*, 55.)
7. **CONSTRUCTION OF CODE—EXCEPTIONS AS TO IDENTIFYING MARKS.**—The fact that the vote for an excessive number of names for one office might be used as an identifying mark does not affect the validity of the ballot in respect of other offices, such identifying marks being relieved from the operation of section 1215 of the Political Code by virtue of the more specific provision of section 1211 of that code, which is a limitation upon section 1215. (*Id.*)
8. **ELECTION CONTEST—ABATEMENT—DEATH OF CONTESTANT AFTER JUDGMENT AGAINST CONTESTEE—APPEAL—SUBSTITUTION OF ADMINISTRATOR.**—Neither the contestant of an election nor his estate can escape liability for costs, in case the contest is unsuccessful; and the action does not abate by the death of the contestant after a

ELECTION (Continued).

judgment annulling the election of the contestee, nor can the contestee be deprived thereby of his right of appeal. Upon death of the contestant pending the appeal, the administrator of his estate may be substituted upon motion in the supreme court, and the case will be heard upon its merits. (*Snibley v. Palmtag*, 31.)

See Corporations, 9, 10.

EMBEZZLEMENT. See Criminal Law, 5-8.

EQUITY.

MONEY HAD AND RECEIVED—EQUITABLE CLAIM TO DEPOSIT—TRUST—

JURY TRIAL.—In an action against a savings bank for money had and received to plaintiff's use, and to determine the adverse claim of the executors of a deceased person to the money claimed, the adverse claim cannot be determined by a court of law; and where the bank expressed its willingness to pay the money as the court might determine, and the nature of the issues joined between the disputants and the evidence adduced thereupon showed that plaintiff is asserting an equitable claim to a deposit made by the decedent for her benefit, and is seeking a judgment in satisfaction of a trust, as against the executors, the action against them is in equity, and the plaintiff is not entitled to a jury trial of the issues joined with them. (*Cauhape v. Security Savings Bank*, 197.)

See Trusts.

ESTATES OF DECEASED PERSONS.

1. LETTERS TO PUBLIC ADMINISTRATOR—BOND—CONSTRUCTION OF CODE.

Under section 1727 of the Code of Civil Procedure, the official bond of the public administrator is ordinarily in lieu of the bond required of administrators generally, and he is not required to give bond in double the value of the personal property, and of the rents and profits of the real estate, under section 1388 of the same code, which has no application when letters are issued to him in his official capacity by order of the court. (*Healy v. Superior Court of Lassen County*, 659.)

2. JURISDICTION OF COURT—ADDITIONAL BOND.—The court is not re-

quired to take any additional bond upon the issuance of letters to the public administrators, but it has jurisdiction to require an additional bond in a less sum than is provided for in section 1388 of the Code of Civil Procedure, by virtue of section 1402 of the same code, if his official bond is known to be insufficient. (*Id.*)

3. NOTICE TO CREDITORS—POWER OF JUDGE TO DESIGNATE NEWSPAPER

—FUNCTION OF ADMINISTRATOR.—In an order for the publication of notice to the creditors of a deceased person, the superior court has no power to designate any newspaper published in the

ESTATES OF DECEASED PERSONS (Continued).

county, but his power of designation of a newspaper is limited to the case where no newspaper is published in the county. The publication of the notice in some newspaper published in the county, or of any additional notice ordered published therein, is a function to be performed by the executor or administrator. (*Brouse v. Law*, 152.)

4. **POWER TO ADJUDGE QUESTION OF DUE PUBLICATION.**—The power of the court to examine the character of the notice that has been published, and to adjudge whether or not due publication has been made, and to refuse to adjudge due publication if it was not sufficient, does not involve the power to designate in the original order the newspaper in which the notice is to be published. (*Id.*)
5. **PROPERTY LESS THAN FIFTEEN HUNDRED DOLLARS—RIGHTS OF WIDOW—REVOCATION OF LETTERS—NOTICE TO CREDITORS—MAXIM.**—A widow, who is administratrix of her deceased husband, cannot have her letters revoked for failing to give notice to creditors for more than two months after her appointment, under section 1511 of the Code of Civil Procedure, where both her petition for letters and the return of the inventory and appraisement show that the entire property of the estate is of less value than fifteen hundred dollars. In such case the widow, if there are no children, is entitled to have the whole estate set apart to her under section 1469 of the same code, without any further proceedings in the administration; and no notice to creditors is necessary. (*Estate of Atwood*, 427.)
6. **PETITION TO REVOKE LETTERS BY PERSONS NOT INTERESTED.**—The law does not permit persons not interested to invoke the machinery of the courts; and a sister and niece of the decedent, who can have no interest in an estate which the widow is entitled to have set apart to her, cannot authorize a person not interested in any manner in the estate to file a petition to revoke letters of administration granted to the widow. (*Id.*)
7. **ACCOUNTS OF ADMINISTRATORS—AMOUNT OF EXPENDITURES WITHOUT VOUCHERS.**—Under section 1632 of the Code of Civil Procedure, the items of expenditure by an administrator, for which no vouchers are produced, but which may be allowed him on his accounting, are expressly limited to items each of which does not exceed twenty dollars, and not aggregating in excess of five hundred dollars. A larger aggregate cannot be allowed, notwithstanding proof of the items in excess may be adduced in corroboration of the administrator's oath as to their correctness. (*Estate of Hedrick*, 184.)
8. **SEMI-ANNUAL RETURNS OF PUBLIC ADMINISTRATOR—ACCOUNT STATED—RIGHTS OF HEIRS.**—The semi-annual statements required to be returned by the public administrator, under section 1736 of the Code of Civil Procedure, are not intended to be settled as statements of account, and cannot be treated as accounts stated

ESTATES OF DECEASED PERSONS (Continued).

or as concluding the rights of the heirs, who may contest any unlawful items contained therein upon the final settlement of the accounts of the public administrator. (Id.)

9. **STIPULATION OF HEIRS AS TO RETURNS—CONTEST OF ITEMS UNVOUCHED FOR.**—A stipulation of the heirs that each of the returns show that during the time embraced therein "the administrator duly paid out, as expenses in this estate," the aggregate amounts included therein, aggregating a sum total, in all of the returns, and further stipulating that the items embraced in the amended final account were correct, excepting an aggregate sum stated, which was contested, and which appears at the hearing to be made up of items of expense in the respective returns for which no vouchers were given, is not to be construed as admitting conclusively the correctness of such contested items, but as only admitting that the returns showed certain total expenses for given periods. (Id.)
10. **REFUSAL OF EXTRA COMPENSATION—DISCRETION OF COURT.**—The action of the court in refusing an allowance of extra compensation to the administrator will not be disturbed upon appeal, where the evidence discloses no abuse of discretion by the court. (Id.)
11. **SETTLEMENT OF ADMINISTRATOR'S ACCOUNT—INTEREST.**—An administrator cannot be charged with interest on money in his hands, unless it is shown or presumed that he has profited thereby, or has been guilty of such willful misfeasance as to justify the court in requiring compensation therefor. (Estate of Marre, 128.)
12. **PENDENCY OF ACTION AGAINST ESTATE—NEGLIGENCE.**—If, at the time of the settlement of the first account of the administrator, an action was pending against the estate of the decedent as trustee for an amount in excess of the money on hand, and no willful negligence appears in the prosecution or settlement thereof until after the filing of his second account, he cannot be charged with interest from the date of his first account, but only from the date of any actual dereliction in duty, which may be shown to have caused loss to the estate. (Id.)
13. **APPEAL BY ADMINISTRATOR—BILL OF EXCEPTIONS—UNSUPPORTED STATEMENTS—DUTY OF ADMINISTRATOR.**—Facts stated in the settled bill of exceptions of an administrator used upon his appeal from an order settling his account must be accepted as true, for the purposes of the appeal. If any of them consisted of unsupported statements of counsel, it was the duty of the administrator to have that fact made to appear in the bill of exceptions. (Id.)
14. **ORAL OBJECTIONS TO ACCOUNT—WAIVER.**—The requirement that the objections to the administrator's account shall be made in writing is waived by the administrator, where the hearing was had upon oral objections made in his presence, and in the pres-

ESTATES OF DECEASED PERSONS (Continued).

- ence of the court, without any demand that they be reduced to writing. (Id.)
15. **PROPERTY SET APART TO USE OF FAMILY—DISCHARGE OF ADMINISTRATOR—FORECLOSURE OF MORTGAGE—PARTIES.**—Where it appears that the whole of the estate of a deceased person has been set apart to the use of the family, subject to encumbrances upon the real estate, under section 1469 of the Code of Civil Procedure, and the administrator has been discharged, he need not be made a party defendant to the foreclosure of a mortgage on the real estate set apart to the family as a homestead. (*Browne v. Sweet*, 332.)
16. **MORTGAGE UPON HOMESTEAD—PRESENTATION OF CLAIM—PROBATE HOMESTEAD.**—It seems that a mortgage upon a homestead, though declared by the decedent in his lifetime, should not be deemed lost for want of presentation of the claim, where the entire estate was set apart to the use of the family, subject to such mortgage, and no further proceedings were permissible, and no opportunity was allowed for the presentation of claims; but where the mortgage is merely upon a probate homestead set apart for the use of the family, no presentation of the mortgage claim is required. (Id.)
17. **PRESUMPTION AGAINST PLEADER—ABSENCE OF AVERMENT—DECLARED HOMESTEAD NOT PRESUMED.**—The presumption against the pleader does not warrant the presumption of facts not averred; and an averment in the action to foreclose the mortgage, that the court set apart the mortgaged property as a homestead, is to be understood as averring a probate homestead, and not a homestead declared by the decedent, which is not averred. (Id.)
18. **ORDER SETTING APART HOMESTEAD ABSOLUTELY—SEPARATE PROPERTY OF HUSBAND—TITLE OF WIDOW.**—An order setting apart to the widow, in general and absolute terms, the whole of a farm as a homestead, which was in fact the separate property of the deceased husband, without limiting the homestead to a life estate, is erroneous, but not void; and, if the time for appeal from the order has expired without appeal, the title to the homestead under the order is vested in the widow in fee. (*Estate of Huelsman*, 275.)
19. **SPECIFIC DEVISE—POWER OF COURT.**—The fact that the property set apart to the widow as a homestead was specifically devised, one-half to the widow, and the other half to two children, cannot affect the power of the court to set it apart as a probate homestead, which is paramount to the power of the testator to devise his estate. (Id.)
20. **ENCUMBRANCE UPON PROBATE HOMESTEAD—DISCHARGE BY EXECUTORS—POWER OF COURT.**—The court has no power to order the executors to discharge the encumbrance of a mortgage upon the probate homestead, the title to which is vested in fee in the widow, where no claim for the debt has been presented against the

ESTATES OF DECEASED PERSONS (Continued).

estate, and the recourse of the mortgagor is limited solely to the mortgaged property so set apart in fee. (Id.)

21. **CONSTRUCTION OF CODE—ENCUMBRANCES UPON DECLARED HOMESTEADS.**—Section 1475 of the Code of Civil Procedure, making provision for the extinguishment of liens and encumbrances upon homesteads, is limited exclusively to homesteads declared during the lifetime of the spouses, and can have no application to probate homesteads, in respect to which there is no corresponding provisions in the code. (Id.)
22. **EXEMPTION OF SPECIFIC DEVISES—TITLE OF WIDOW UNDER HOMESTEAD ORDER.**—The title of the widow being under the homestead order in fee, and not under the devise, she cannot take advantage of the provisions of section 1544 and 1563 of the Code of Civil Procedure, exempting specific devises from the payment of the debts of the estate. (Id.)
23. **ALLOWED CLAIM UPON NOTE—INEFFECTIVE MORTGAGE NOT DESCRIBED.** An allowed claim upon a note against the estate of a deceased person, which makes no description or mention of a mortgage given by the decedent to secure it, is a valid claim against the estate, where it appears that the mortgage was ineffective, upon the ground that the decedent had no interest in the mortgaged property, either at the time of the mortgage or at any time subsequent thereto. (Otto v. Long, 471.)
24. **ABSENCE OF LIEN—CONSTRUCTION OF CODE—PERSONAL LIABILITY FOR DEBT.**—A mortgage of property in which the mortgagor neither has nor acquires any interest creates no lien, and cannot properly be foreclosed; and, in such case, it does not violate the policy established by section 726 of the Code of Civil Procedure to allow a personal action upon the note. The rule that the mortgagee is personally liable for the entire debt should the same where no lien is created as where the lien has been lost without the fault of the mortgagee. (Id.)
25. **NEW MORTGAGE BY DEVISEES—CONSIDERATION—RELEASE OF CLAIM AGAINST SOLVENT ESTATE—EXTENSION OF TIME.**—The release and acknowledgment of satisfaction and discharge of the claim upon the note against the solvent estate of the decedent, and the extension of time to the devisees as the sole parties in interest in which to pay the debt, is a sufficient consideration for the execution of a new and valid mortgage by the devisees upon the property in fact owned by them, which was described in the first ineffective mortgage executed by the decedent. (Id.)
26. **IMMATERIAL MISTAKES AS TO SOURCE OF TITLE.**—The mutual mistake of the mortgagors and mortgagee in supposing that the mortgaged property belonged to the estate of the decedent, that the original mortgage executed by the decedent was valid, and that the devisees acquired title from his estate, whereas in fact they owned it by an independent title, is immaterial, so far as re-

ESTATES OF DECEASED PERSONS (Continued).

- spects the consideration for the mortgage executed by them, and the validity and effectiveness of their mortgage. (Id.)
27. **MISTAKE AS TO REMISSION OF PART OF DEBT—MISCALCULATION—NEGLIGENT IGNORANCE.**—A mutual mistake of the claimant of the note against the estate and the devisees as to the amount due, based upon a miscalculation by the claimant, each supposing that the devisees in executing the new mortgage were receiving the benefit of a reduction of four hundred dollars, the debt being in fact less than the face of the mortgage, cannot affect the validity of the mortgage for the sum actually due. The allowed claim having included a copy of the note with the credits thereon, the mortgagors were as chargeable as the mortgagee with information as to the amount of the debt; and their failure to compute the interest and their ignorance of the truth was the result of their own gross negligence. (Id.)
28. **REMOVAL OF ADMINISTRATOR—INVALID JUDGMENT UPON CLAIM.**—After the removal of an administrator from his trust, he ceases to have any connection with the estate, and no judgment rendered against him while removed can bind the estate, or have any validity as evidencing the existence of a claim against the estate. (More v. More, 460.)
29. **APPEAL FROM ORDER OF REMOVAL—SUSPENSION OF ADMINISTRATOR—JUDGMENT PENDING APPEAL—VACATING ORDER.**—An appeal from an order removing an administrator does not revive or restore his powers, but he remains suspended from office pending the appeal, and has ceased from the date of the removal to be practically and in effect the administrator of the estate, until such time as the order may be reversed. No judgment can properly be rendered against him pending such appeal; and an order vacating a judgment upon a claim so rendered is proper, and must be affirmed. (Id.)
30. **ACTION UPON WRITTEN PROMISE OF DECEDENT—STATUTE OF LIMITATION.**—An action upon a written promise of a decedent to pay money, brought more than four years and nine months after its maturity and one year and eight months after the issuance of letters of administration, is barred by the terms of sections 337 and 363 of the Code of Civil Procedure. (Barclay v. Blackinton, 189.)
31. **STATUTORY SUSPENSION—PRESENTATION AND REJECTION OF CLAIM—RIGHT OF ACTION.**—In such case, there is no statutory suspension of the right of action beyond the period of ten days after presentation of the claim, after which action may be brought as upon a rejected claim and the limitation of one year after the issuance of letters of administration, operating to extend the general statute of limitations, cannot be further extended by the neglect of the administrator to indorse a formal rejection of the claim thereupon. (Id.)
32. **SPECIAL STATUTORY LIMITATION OF THREE MONTHS—EFFECT UPON GENERAL STATUTE.**—The special statutory limitation of three

ESTATES OF DECEASED PERSONS (Continued).

months after the rejection of a claim in which to bring action thereupon, is independent of and collateral to the general statute of limitations. It may shorten, but cannot lengthen, the operation of the general statute. After a claim is barred by the general statute of limitations, it can never be allowed or made a valid claim against the estate by any act or neglect of the administrator. (Id.)

33. **CLAIM FOR GUARANTEED VALUE OF STOCK—PARTICULARS OF CLAIM.** Under a contract by which one thousand shares of mining stock were delivered by the decedent in part payment for land purchased, at fifty cents per share, guaranteed to be worth that in cash in two years, he agreeing to take the stock from the vendor of the land at that figure if at the end of two years the vendor should hold the stock and so request, a claim presented against his estate a few days after the expiration of the two years, by the vendor of the land for five hundred dollars, with a copy of the contract attached, and an offer to surrender the shares of stock to the administrator in the same condition in which they were received, sufficiently states the particulars of the claim. (*Maurel v. King*, 114.)
34. **DEMAND UNDER CONTRACT—MATURITY OF CLAIM—PRESENTATION—LIMITATION OF ACTIONS.**—Conceding that the claim under the contract for the five hundred dollars was not due until demand made thereunder, it became due upon proper presentation of the claim to the administrator, which is in its nature a demand upon the estate; and, upon rejection of the claim, an action may be maintained thereupon within three months thereafter. The provision for an action within two months after the maturity of a claim not yet due is intended to extend and not to limit the three months' period. (Id.)
35. **DELAY IN PRESENTING CLAIM—CONSTRUCTION OF CONTRACT—EXTENSION OF CREDIT—REASONABLE TIME FOR OPTION.**—The stipulated period of two years allowed under the contract was an extension of credit to the decedent, who could not, during that period, be compelled to pay the five hundred dollars in lieu of the stock; and the vendor of the land was allowed a reasonable time at the expiration of that period to exercise his option to demand the money for the stock. A delay of four days after expiration of the two years in presenting the money demand to the administrator of the decedent was not unreasonable. (Id.)
36. **SOLVENT ESTATE—INTEREST ON CLAIM.**—An allowed claim against a solvent estate of a deceased person, which is based upon a contract bearing a greater rate of interest than the legal rate, continues to bear the contract rate of interest until its payment. Section 1494 of the Code of Civil Procedure, limiting the rate of interest to that allowed on judgments, applies only to claims against insolvent estates. (*Richardson v. Diss*, 58.)

ESTATES OF DECEASED PERSONS (Continued).

37. **CONSTRUCTION OF CODE—HEADNOTE TO SECTION.**—The headnote of section 1494 of the Code of Civil Procedure, to the effect that "claims to be sworn to, and, when allowed, to bear same interest as judgment," cannot be treated as an enactment of law standing by itself, but should be construed in its contextual relation to the whole section of which it is a part. (Id.)
38. **CLAIMS—ACTION UPON REJECTED CLAIM—VARIANCE.**—No action can be maintained upon a claim against the estate of a deceased person which has not first been presented for allowance, and no recovery can be had in an action upon a rejected claim, upon any cause of action not included in the claim. In an action upon a claim for specified services and specific compensation therefor, a recovery at the rate of thirty dollars per month for two years is a variance which has no foundation in the claim presented, and cannot be supported. (*Barthe v. Rogers*, 52.)
39. **BURDEN OF PROOF—FAILURE OF EVIDENCE—NONSUIT NOT REQUIRED.**—The burden of proof is upon the plaintiff in an action upon a rejected claim to establish that claim. If the evidence of the plaintiff fails to establish the claim sued upon, owing to his misfortune in not being competent to testify in his own behalf, the obligation of the administrator is not hereby varied; nor is the administrator bound to move for a nonsuit, but he may submit the case upon the plaintiff's testimony, and ask for a judgment upon the merits. (Id.)
40. **REJECTED CLAIM AGAINST ESTATE—PART OF CLAIM BARRED BY STATUTE.**—Upon the trial of an action upon a rejected claim against the estate of a deceased person, for services rendered at his request, the evidence must be confined to proof of services rendered within two years prior to the death of the decedent. Neither the executor nor the judge had any right to allow any part of the claim which was barred by the statute of limitations. (*Etchas v. Orena*, 588.)
41. **BROKEN PROMISE TO PROVIDE BY WILL NOT PRESENTED AS A CLAIM.** A broken promise to provide by will a compensation for services rendered to the decedent must be presented as a claim against the estate, in order to be relied upon as a continuing contract for services up to the time of his death, and, if not so presented, it cannot be relied upon to save the bar of the statute as to part of a rejected claim for services presented against the estate. No other cause of action can be properly alleged or proved than that stated in the claim presented and passed upon by the executor. (Id.)
42. **REVERSAL OF DECREE OF DISTRIBUTION—RECOVERY BY EXECUTORS FROM DISTRIBUTEE—PAYMENT OF PERSONAL DEBTS.**—Upon the reversal of a decree of distribution, the assets of the estate paid to the distributee under the decree may be recovered back by the executors. It is no defense to such recovery that a portion of

ESTATES OF DECEASED PERSONS (Continued).

the assets distributed were applied by the distributees in payment of personal debts, and the payees are not required to make restitution. (*Ashton v. Heydenfeldt*, 442.)

43. **PROMPT COMPLIANCE WITH DECREE BY EXECUTORS—PRESUMPTION—TITLE OF DISTRIBUTEE AND PAYEES.**—The executors did not act at their peril in promptly complying with the decree of distribution before the expiration of the time for appeal; but they and all parties interested were entitled to presume that the judgment of distribution was right and would be affirmed. The distributees had a perfect title to the money distributed, and might transfer title thereto by payment to personal creditors at any time prior to an actual reversal of the judgment, which alone could destroy or impair the distributee's right. (*Id.*)
44. **PAYMENT TO CREDITORS—TRANSFER OF BANK CREDITS.**—A payment to creditors of the distributee is effected by a transfer of bank credits in a savings bank, and the opening of a new account by the bank and the issuance of a bank-book in the name of each creditor so paid. (*Id.*)
45. **PERSONAL DEBTS TO EXECUTORS—SETTLEMENT AND PAYMENT—RELEASE OF MORTGAGE.**—A transfer of bank accounts in the amount of personal debts of the distributee to each of the executors, accompanied by a release of a mortgage securing the same, shows a settlement and payment of such debts by the distributee; and the amount thereof cannot be deducted from a recovery by the executors against the distributee, after reversal of the decree of distribution. (*Id.*)
46. **SALE OF REAL ESTATE—SUFFICIENCY OF PETITION—REVIEW UPON APPEAL.**—A petition for the sale of real estate which shows a substantial compliance in all respects with the requirements prescribed by section 1537 of the Code of Civil Procedure, is sufficient to sustain an order of sale upon appeal therefrom; and the petition cannot be assailed upon appeal for any mere uncertainty or inaptness of expression which was not objected to by special demurrer or otherwise in the court below. (*Estate of Heydenfeldt*, 456.)
47. **SALE OF UNPRODUCTIVE PROPERTY—WILL—APPLICATION OF PROCEEDS TO DEBTS—FINDING AS TO PROCEEDS—ESTOPPEL.**—Upon petition of the executors to sell unproductive property, the proceeds of the sale of which are directed by the will to be applied in payment of debts, a finding that the executors have no proceeds of the sales of such property in their hands is not barred by the estoppel of a former finding, made upon a previous petition of a daughter of the decedent to direct the executors to pay a mortgage debt upon property willed to her, to the effect that the amount then realized from the sales of unproductive property, inclusive of such property then unsold, would largely exceed the mortgage debt, there can be no element of estoppel in the former finding where it appears that much of the property had since been used

ESTATES OF DECEASED PERSONS (Continued).

for other purposes, that the former finding was not necessary to the judgment in that proceeding, and that the executors were then on the same side with the appellant who urges the estoppel; and either of these facts is sufficient to preclude the estoppel. (Id.)

48. GENERAL ORDER OF SALE—APPLICATION OF PROCEEDS—PRESUMPTION.

Where the order of sale appealed from included both unproductive and other property, and the sale of the entire property was ordered for the payment of debts, and of large expenses of administration, taxes, etc., it is to be presumed that the court will properly distribute the proceeds of sale, in view of all the facts in the case, and the rights of the parties interested. (Id.)

49. SALE OF REAL ESTATE—COMPETITIVE BIDS UPON HEARING OF RETURN—DISCRETION OF COURT.

At the hearing of a return of sale of real estate of a deceased person, under section 1552 of the Code of Civil Procedure, the court is not bound either to accept the offer of a first bidder at an increase of ten per cent upon the price bid at the sale, or to order a new sale; but the court has discretion to receive at such hearing as many competitive bids as may be offered, and, upon a consideration of all the bids, may then determine whether to accept the highest bid or to order a new sale. (Estate of Griffith, 543.)

50. POSTPONEMENT OF HEARING AFTER ADVANCE BID—JURISDICTION.—

After the making of an advance bid, the court has jurisdiction to postpone a further hearing upon the matter until another day, and has the same jurisdiction to receive additional bids at the postponed hearing which it had at the original hearing. (Id.)

51. CONFIRMATION OF SALE TO PURCHASER AT INCREASED BID.—Where,

at the hearing of the return of sale, an advance bid of ten per cent was made, and, at a postponed hearing, the purchaser offered a still higher bid, and the advance bidder then declined to make any further bid, a confirmation of the sale to the purchaser at the highest bid is within the discretion of the court. (Id.)

52. ACTION UPON NOTE BY EXECUTOR—COUNTERCLAIM—SHARE OF DECEDENT'S INDEBTEDNESS TO CORPORATION.—

In an action upon a note of the defendant to the decedent brought by the administrator, the defendant cannot offset, by way of counterclaim, his alleged share in an indebtedness of the decedent to a corporation formed by them as partners, for which alleged indebtedness no claim was presented against the estate. (Reed v. Johnson, 538.)

53. PLEADING OF COUNTERCLAIM—BURDEN OF PROOF—APPEAL FROM JUDGMENT—FAILURE TO FIND UPON ISSUE—PRESUMPTION.—

The alleged matter of counterclaim was deemed controverted by the plaintiff, and the burden of proof was upon the defendant to establish it; and upon an appeal from the judgment, where

ESTATES OF DECEASED PERSONS (Continued).

the evidence cannot be reviewed, it must be presumed, in favor of the judgment and against error therein, that a failure to find upon the issue as to the counterclaim was not prejudicial to the appellant, and that a finding thereon, if made, would be adverse to the appellant. (Id.)

54. **PROCEEDING TO DETERMINE HEIRSHIP—HOSTILE PARTIES—INDEPENDENT ACTORS—CROSS-EXAMINATION OF WITNESSES.**—In a proceeding to determine heirship under section 1664 of the Code of Civil Procedure, each person who appears, and either by complaint or answer sets up a distinct claim of heirship, or right to distribution of the estate, peculiar to himself is an actor, and has a separate and independent right to conduct his case according to his own judgment, including the right to cross-examine the witnesses of hostile parties; and an independent actor styled a defendant cannot be compelled to yield his judgment as to cross-examination of a witness to that of counsel for the plaintiff. (Estate of Kasson, 496.)
55. **REPETITION OF CROSS-EXAMINATION—IDENTITY OF QUESTIONS—DISCRETION OF COURT.**—One party cannot be rightfully precluded from cross-examining the witness of a hostile party as to a certain subject matter, upon the ground that a different hostile party had previously examined him as to that matter; but, where there are numerous parties, the court may, in its discretion, prevent frequent and apparently useless repetitions of the same identical questions by different parties. (Id.)
56. **CROSS-EXAMINATION OF MATERIAL WITNESS—IMPROPER RESTRICTION.** Where a hostile witness has testified to material matters extending over a long period of time, upon whose testimony the court has based its findings against the appellant, a liberal latitude should have been given to the appellant on cross-examination to test the intelligence, accuracy of memory, disposition to tell the truth, bias, relation to the parties, interest, and motives of the witness; and a refusal to allow a reasonable cross-examination of such a witness is ground of reversal. (Id.)
57. **IMPROPER IMPEACHMENT OF WITNESS—KEEPING HOUSE OF ILL-FAME.** A witness cannot be asked on cross-examination, for purposes of impeachment, whether she did not keep a house of prostitution in a place where she had lived. (Id.)
58. **CONTEST OF WILL—ARBITRATION—ESTOPPEL OF PROPONENTS.**—The matter of the contest of a will cannot be submitted to arbitration, and the proponents of the will cannot be estopped by an award thereunder to insist upon the probate of the will, especially where the principal beneficiary under the will is a minor, and the arbitrator is to make his award without evidence, and to determine from his own judgment what is a reasonable, just, and equitable amount to be set over to the contestants by the beneficiaries under the will. (Estate of Carpenter, 582.)

ESTATES OF DECEASED PERSONS (Continued).

59. **PROBATE OF WILL—PROCEEDING IN REM—STIPULATION OF HEIRS.**—The matter of the probate of a will is a proceeding *in rem*, binding on the whole world; and a few persons claiming to be heirs cannot by stipulation determine a controversy in reference to that matter. (Id.)
60. **EVIDENCE—ISSUE OF INSANITY—DISCRETION.**—The admission of evidence upon the issue of insanity is largely in the discretion of the court, and is not ground of reversal if no abuse of discretion appears. (Id.)
61. **REJECTION OF EVIDENCE—RELEVANCE AND MATERIALITY NOT SHOWN.** The rejection of evidence offered by the contestants, which might have been material, if taken in connection with other evidence, does not appear to be ground for reversal, where the evidence is not brought up, and where the offer was not accompanied by any statement showing its relevancy, or the purpose for which it was offered. (Id.)
62. **REFUSAL TO SUBMIT ISSUE OF MENACE—EVIDENCE NOT SHOWN—ERROR PRESUMED HARMLESS.**—It is error to refuse to submit to the jury an issue as to whether the will was procured by menace, even if there was no evidence on that issue for the contestants; but, in the absence of such evidence, it would be the duty of the jury to find thereupon for the proponents of the will, and the error must be presumed harmless, upon the appeal of the contestants, where the record does not show that sufficient evidence was introduced to sustain a finding in their favor if made upon that issue. (Id.)
63. **STIPULATION THAT CONTESTANTS INTRODUCED EVIDENCE—INSUFFICIENT SHOWING.**—A stipulation, in lieu of the evidence that the “contestants introduced evidence on the issue of menace,” is insufficient to show that the evidence adduced would be sufficient to sustain a finding in favor of the contestants. Parties relying upon a stipulation which takes from the appellate court the power to determine an appeal upon the real facts should see that they are sufficient. (Id.)

See Aliens, Appeal, 10-12; Corporations, 23; Election, 8; Mortgage, 1-3; Wills.

ESTOPPEL.

1. **INSOLVENCY—REPLEVIN BY ASSIGNEE—SUPPLEMENTAL ANSWER—JUDGMENT IN ANOTHER ACTION—RES ADJUDICATA.**—In an action of replevin brought by an assignee of insolvent debtors to recover property sold at sheriff's sale by preferred creditors, the defendants may be allowed to set up by supplemental answer that, in another action commenced in another county, by the assignee to recover the same property against two of the same defendants, judgment had been rendered in favor of the defendants and against the plaintiff. Such judgment is *res adjudicata* and operates as an estoppel between the parties thereto, whether erroneous or not. (Keech v. Beatty, 177.)

ESTOPPEL (Continued).

2. **EVIDENCE—OPINION OF JUDGE—LEGAL EFFECT OF JUDGMENT.**—The opinion of the judge rendering the judgment relied upon as an estoppel is not admissible to control the legal effect of the judgment where the record shows that the cause of action and the parties are the same, as respects the plaintiff and two of the defendants to the present action. (Id.)
3. **FINDINGS—DEFEAT OF RECOVERY.**—Where the court finds upon sufficient evidence in favor of the defense of *res judicata* as to two of the defendants, and that the only other defendant did not have in his possession any of the property described in the complaint at the commencement of the action, and that plaintiff is not, and never has been, the owner, nor entitled to the possession of the property, the plaintiff is not entitled to recover. (Id.)
4. **CONSISTENCY OF FINDINGS—PURCHASE AT SHERIFF'S SALE—INTENDED PREFERENCE BY INSOLVENTS—ESTOPPEL BY JUDGMENT—OWNERSHIP.** Findings that one of the defendants purchased the property described in the complaint at sheriff's sale, and had disposed of a large part of it before the commencement of the action, and that he and another defendant, parties to the suit in which the other judgment was rendered, seized the property upon execution for the purpose of obtaining a preference, having reasonable cause to believe the debtors insolvent, are not inconsistent with the findings that the judgment is an estoppel between the parties thereto, and that the plaintiff is not, and never has been, the owner of, nor entitled to the possession of, the property. (Id.)
5. **SALE—DELIVERY AND CHANGE OF POSSESSION—ESTOPPEL OF ATTACHING CREDITOR.**—An attaching creditor is estopped to attack the validity of a sale of personal property made by the debtor on the ground that it was void as to creditors for want of an immediate delivery and actual and continued change of possession, as demanded by section 3440 of the Civil Code, where it appears that the sale was consented to and recognized as valid by the attaching creditor, with full knowledge of the facts that the purchase was made for a valuable consideration, in good faith, and without intent to defraud the creditors of the vendor, and that, acting thereupon, the purchaser was induced to expend a large sum of money, which would not otherwise have been expended. (Sullivan v. Johnson, 230.)
6. **CLAIM AND DELIVERY—SHERIFF BOUND BY ESTOPPEL.**—In an action of claim and delivery brought by the purchaser against the sheriff who levied the attachment, the sheriff stands in the shoes of the attaching creditor, and is bound by the estoppel against such creditor, and cannot defend the action by justifying under the writ of attachment. (Id.)

See Counties, 2, 3; Estates of Deceased Persons, 47, 58; Landlord and Tenant, 3; Mistake, 2; Mortgage, 9.

EVIDENCE.

1. **ASSUMPSIT FOR WORK AND LABOR—DEFENSE—JOINT VENTURE TO PROSPECT FOR MINES—VARIANCE.**—In an action to recover the value of work and labor performed for the defendant as bookkeeper, salesman, and clerk, where the answer pleaded as a defense that the work and labor was done under an agreement made prior thereto between plaintiff, defendant, and a third person, to undertake a joint enterprise to prospect for mines, under which defendant and the third person were to do the prospecting and to share equally with the plaintiff in mineral discoveries, in consideration of his services, in the absence of evidence of the agreement alleged, evidence of a subsequent agreement made after eight months' services had been rendered by the plaintiff, as to future prospecting for mines, is properly excluded, as not being within the issues presented by the pleadings. (*Crusoe v. Clark*, 341.)
2. **IMPEACHMENT OF WITNESS—CONTRADICTIONARY STATEMENTS—IRRELEVANT MATTERS.**—A witness cannot be impeached by contradictory statements as to matters irrelevant to the issues; and it was not error to refuse to permit the plaintiff to be contradicted as a witness by proof that an irrelevant conversation as to future prospecting, which the plaintiff had denied, was in fact had between the plaintiff, the witness, and the defendant. (*Id.*)
3. **CONCLUSION OF WITNESS—UNDERSTANDING OF OTHERS—EXPECTATION OF PLAINTIFF.**—Questions asked, calling, not for facts, but for the conclusion of the defendant as a witness, as to what the plaintiff and a third person understood, in reference to the interest of the plaintiff in a prospecting venture, and as to whether the plaintiff expected wages from the defendant, were properly disallowed. (*Id.*)
4. **DISBURSEMENTS IN PROSPECTING VENTURE—PLEADING.**—The amount of disbursements made by the defendant in the prospecting venture, in reference to which the pleadings were silent, and upon which there was no issue, is immaterial and not admissible in evidence. (*Id.*)
5. **VALUE OF PLAINTIFF'S SERVICES—QUALIFICATIONS OF WITNESSES.**—Witnesses residing in the county in which the services were rendered by plaintiff, though at a distance from the place where they were rendered, who were in court and heard the evidence of the plaintiff, and who were business men of experience and had employed other persons for like services, and who testified that they knew the value of such work in the county, are qualified to testify to the value of the plaintiff's services. (*Id.*)
6. **BOOKS KEPT BY PLAINTIFF—EVIDENCE FOR DEFENDANT.**—The books kept by the plaintiff are admissible in evidence for the defendant upon the issue as to the value of the plaintiff's services, and as tending to explain the nature and extent of his work; and also to prove the amount of monthly sales, oral proof of which by defendant was objected to by plaintiff on the ground that the

EVIDENCE (Continued).

books were the best evidence. Defendant may also, upon the issue as to the value of plaintiff's services, show by another bookkeeper who has examined such books that they were not complicated, but a simple set of books to keep, and could be kept by any person of ordinary skill in bookkeeping. (Id.)

7. **ERROR WITHOUT PREJUDICE—INSUFFICIENT RECORD.**—The error in rejecting the books and the evidence relating thereto must be deemed without prejudice, where the record does not show anything about their contents or materiality, or disclose anything to enable the appellate court to determine whether the error of the superior court was or was not prejudicial. (Id.)
8. **INSTRUCTION AS TO BASIS OF VALUE OF SERVICES—PLACE OF EMPLOYMENT—COMPARISON OF WAGES AT OTHER PLACES.**—It is not ground for reversal to refuse a requested instruction limiting the consideration of the jury to evidence of the rate of wages generally paid at the particular place of employment in the county, and telling them that the value of services cannot be based in any degree upon wages for like services elsewhere in the county, without first showing that the rate was the same. A comparison may be made even if the wages elsewhere in the county were not the same, which would in some degree tend to show the value of the services at the place where performed. (Id.)
9. **ACTION TO DETERMINE CLAIM TO MONEY—BANK DEPOSIT BY DECEASED PERSON—HEARSAY.**—In an action to determine a claim of the plaintiff to money deposited in bank by a deceased person, the dividends upon which were made payable to the order of plaintiff, after evidence given of a conversation with the deceased person about the plaintiff, further evidence as to the prior acts and declarations of the father of the deceased person during his last illness is not admissible as being explanatory of how the conversation arose, and such further evidence is properly stricken out as hearsay. (Cauhape v. Security Sav. Bank (197.)

See Contract, 1-3; Criminal Law, 2, 5, 7, 11-14, 16, 20, 28, 31-33, 35-38, 40, 45-47, 49, 52, 53, 56-60, 66, 67, 69; Estates of Deceased Persons, 54-57, 60-63; Estoppel, 2; Findings; Landlord and Tenant, 2; Mortgage, 32; Negligence, 1, 9, 10, 13; Partnership, 7; Practice, 3, 4; Statute of Frauds, 2; Trusts, 6, 7.

EXECUTION.

1. **VACATING SALE UNDER FORECLOSURE—SEPARATE OFFER OF PARCEL—SALE EN MASSE.**—A sale under the foreclosure of a mortgage by a commissioner appointed by the court, without direction as to the manner of sale, cannot be vacated on the ground of the sale of separate parcels *en masse*, where it appears that the commissioner

EXECUTION (Continued).

had complied with the request of the mortgagor to offer them each for sale separately, and had received no separate bids, and thereupon sold the same *en masse* for a sum sufficient to satisfy the judgment. (Connick v. Hill, 182.)

2. **INSUFFICIENT SHOWING.**—An affidavit to set aside a commissioner's sale under foreclosure for selling certain parcels *en masse* which had been separately offered for sale without a bid, and for refusing to reoffer in parcels, or to postpone the sale, which does not show that the parcels in question were "known lots or parcels," is insufficient. (Id.)
3. **REFUSAL TO SELL IN "COMBINATIONS OF PARCELS"—STATEMENT OF GROUND—CONFLICTING EVIDENCE.**—When no such ground for setting aside the sale as a refusal of the commissioner to sell in "combinations of parcels" was stated in the notice of motion, or in the opening affidavit, and the court found upon conflicting evidence that no request for such sale was made, it must be presumed that the finding is correct, and such ground, even if otherwise tenable, must fail. (Id.)
4. **INADEQUACY OF PRICE—FINDING AS TO VALUE.**—Inadequacy of price is not a sufficient ground for setting aside a judicial sale under our practice, the judgment debtor being allowed to redeem from the sale. The sale certainly cannot be disturbed where the court found, under conflicting evidence, that the full value of the property sold was less than the total purchase price. (Id.)
5. **REFUSAL TO POSTPONE SALE—DISCRETION.**—It is not an abuse of discretion for the commissioner to refuse to postpone the sale, where no reason appears why the sale should have been postponed. (Id.)

See Appeal, 7, 8, 17; Injunction; Interpleader, 3; Trusts, 1.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons.

EXTORTION. See Criminal Law, 9-13.

FALSE PRETENSES. See Criminal Law, 14-17.

FEEs. See Jury and Jurors.

FINDINGS.

1. **ACTION FOR SERVICES AGAINST CORPORATION—FINDING AGAINST EVIDENCE—EMPLOYMENT BY STOCKHOLDERS PERSONALLY.**—In an action against a corporation for services rendered therefor, at its request, a finding that the plaintiff was employed by the corporation is against the evidence, where it appears without conflict that the employment of plaintiff was made by two of the shareholders of the corporation personally, acting in their own

FINDINGS (Continued).

behalf, and not for the corporation, and that they were not entitled to charge the corporation therefor, if they had performed the services personally. (*Brown v. Valley View Min. Co.*, 630.)

2. **SUFFICIENCY OF EVIDENCE—APPEAL.**—Findings contrary to the evidence relating to immaterial matters not necessary to the support of the judgment, which is sustained by other findings of ultimate facts not inconsistent with the immaterial findings assailed, are not prejudicial error, and will be disregarded upon appeal. (*Costa v. Silva*, 351.)

See Estoppel, 3, 4; Pleading, 3.

FORECLOSURE. See Execution; Mortgage.

FORGERY. See Criminal Law, 18.

FRAUD. See Mistake, 1; Mortgage, 19.

GAME.

1. **VOID COUNTY ORDINANCE—UNREASONABLE RESTRICTION AS TO TRANSPORTING GAME—HABEAS CORPUS.**—A county ordinance forbidding the shipment or transportation of game from the county which has been lawfully killed therein, is an unreasonable and oppressive restriction in restraint of trade, and in violation of the rights of private property, and is invalid and void; and a person convicted thereunder must be discharged upon *habeas corpus*. (*Ex parte Knapp*, 101.)
2. **UNREASONABLE DISCRIMINATION.**—An ordinance intended to discriminate in favor of sportsmen and against all other persons in respect of the disposition of game lawfully killed, is not a proper exercise of police power. [*Per Temple, J., Van Dyke, J., and Harrison, J.*] (*Id.*)

GIFT.

1. **SEPARATE PROPERTY OF WIFE—DEPOSIT IN SAVINGS BANK—PASS-BOOK IN JOINT NAMES PAYABLE TO EITHER—GIFT OR JOINT OWNERSHIP NOT SHOWN.**—Upon the deposit of money which is the separate property of the wife, the taking of a pass-book showing an account in the names of the husband and his wife, "and payable to the orer of either of them," does not, by the form of the deposit, indicate any gift to the husband, or any joint interest of both parties in the deposit, with right of survivorship, or change the rules applicable to a deposit of the wife's separate property in the alternative names of the husband and wife. (*Denigan v. San Francisco Sav. Union*, 142.)
2. **BURDEN OF PROOF UPON HUSBAND'S DONEE.**—The burden is upon the husband's donee of the deposit to show that it ceased to be the separate property of the wife, and that by the wife's intention title thereto was vested in the husband, and, in the ab-

GIFT (Continued.)

sence of evidence tending to sustain that burden, his claim must be denied. (Id.)

3. CREATION OF JOINT INTEREST—EXPRESS DECLARATION REQUIRED.—

A joint interest in personal property, with the right of survivorship, can only be created in accordance with section 683 of the Civil Code, which applies both to real and personal property, and requires it to be created by a title vested in several persons in equal shares by a single instrument, in which a joint tenancy is expressly declared. It cannot be established in respect of money belonging to the wife by an independent title, by depositing it and taking a pass-book in the names of the husband and wife without any express declaration that the money should be held in joint tenancy. (Id.)

4. WORDS INCONSISTENT WITH JOINT INTEREST.—The use of the words in the pass-book "payable to the order of either of them" is inconsistent with a joint interest, and takes away any valid claim thereof. (Id.)

5. PRESUMPTION OF JOINT RIGHT—CONSTRUCTION OF CODE.—The provision of section 1431 of the Civil Code, that a right created in favor of several persons is presumed to be joint and not several, unless overcome by express words to the contrary, has reference only to the relation between the parties in whose favor the right is created and the party against whom it exists, and does not determine the relation of joint interest and benefit of survivorship as between the owners of the right in their relations to each other. (Id.)

6. SURVIVORSHIP OF RIGHT OF ACTION—TRUSTEESHIP OF FUND.—The survivorship of a right of action upon a joint chose in action does not divest the beneficial ownership of the deceased promisee, and the surviving promisee, upon collecting the fund, is a trustee of the estate of the decedent, according to his right, as between them, in a part or in the whole of the fund, as the case may be. (Id.)

7. SEPARATE PROPERTY OF WIFE—DEPOSIT IN SAVINGS BANK—PASS-BOOK IN ALTERNATIVE NAMES—GIFT TO HUSBAND NOT SHOWN.—Upon the deposit of money which is the separate property of the wife in a savings bank, the taking of a pass-book showing an account with the bank in the alternative names of the husband or wife, is consistent with the desire of the wife to give her husband authority to withdraw the money for her use, when needed; and the wife having retained the right to withdraw the whole of the money, and the pass-book not being shown to have been delivered by her to the husband, nor possessed by him until after her death, no gift to the husband is shown or indicated, but the money remained the separate property of the wife, and is to be administered upon as such. (Denigan v. Hibernia Sav. etc. Soc., 137.)

GIFT (Continued).

8. **BURDEN OF PROOF UPON DONEE OF HUSBAND.**—The burden of proof is upon a donee of the deposit claiming under the husband, without consideration, to show affirmatively that the husband had acquired a title to what had been the wife's separate property, and that it had ceased to be such. (Id.)
9. **PRESUMPTION—NATURE OF GIFT—RENUNCIATION OF RIGHT OF GIVER.** There is no presumption in favor of a gift. A gift in its nature divests the donor of all title, and requires a renunciation of all claim and interest of the donor in the subject of the gift. The retention by the wife of the right to withdraw the whole of the deposited money in her own name from the bank is inconsistent with the idea of a gift thereof to her husband. (Id.)
10. **GIFT CLAIMED AFTER DEATH—PROOF REQUIRED.**—When the claim of a gift is not asserted until after the death of the alleged donor, clear and satisfactory evidence of every element which is requisite to constitute a gift is required to sustain such claim. (Id.)
11. **APPEAL BY CLAIMANT UNDER HUSBAND—PAYMENT BY BANK ON HUSBAND'S ORDER—QUESTION OF AUTHORITY NOT INVOLVED.**—The husband not having title to the deposit, could give none to his donee thereof, and upon appeal by one claiming as such donee from a judgment sustaining the title of the wife's administrator to the residue of the deposit, after deducting a payment made by the bank, after the husband's death, to a third person on the husband's written order, cannot question the authority of the bank to make such payment. (Id.)

GUARDIAN AND WARD.

1. **GUARDIANSHIP OF INCOMPETENT PERSON—NOTICE OF HEARING—JURISDICTION—VOID APPOINTMENT.**—An incompetent person must be served with proper notice, both of the time and place of hearing of an application for guardianship of his person and estate, before the court can acquire jurisdiction to make the appointment. An order and notice specifying merely a day for hearing, without specification of hour or place, is insufficient; and, after an adjournment of the hearing until Tuesday, March 3d, the appointment of a guardian on Tuesday, March 2d, is without jurisdiction and void. (McGee v. Hayes, 336.)
2. **PRESENCE OF INCOMPETENT PERSON—WAIVER OF NOTICE—CONSENT TO JURISDICTION.**—The required presence of the incompetent person at the hearing cannot have the effect to dispense with or waive proper notice of the hearing. He is incapable of consenting to the jurisdiction, and cannot waive any steps necessary to confer jurisdiction upon the court. (Id.)
3. **COLLATERAL ATTACK UPON JURISDICTION.**—A void appointment of a guardian of an incompetent person, which shows upon the face of the record that the court was without jurisdiction to make the

GUARDIAN AND WARD (Continued).

order, is subject to collateral attack in an action brought in the name of the incompetent person by such guardian. (Id.)

HOMESTEAD. See Estates of Deceased Persons, 16-22; Insolvency, 5.

HUSBAND AND WIFE. See Gift; Partnership, 6, 7.

INJUNCTION.

1. **EXECUTION OF JUDGMENT.**—An injunction will not lie to restrain the execution of a judgment upon grounds which were available to the defendant in the original action. (Hollenbeak v. McCoy, 21.)
2. **INSUFFICIENT COMPLAINT—JUDGMENT IN JUSTICE'S COURT—NEGLECT TO APPEAL.**—A complaint for an injunction to restrain the enforcement of a judgment in the justice's court, from which it appears that the grounds therefor were known to the plaintiff within a week after the verdict against him, and that the plaintiff negligently failed to avail himself of the remedy therefor by appeal within the time limited by law, does not state a cause of action for the interference of a court of equity. (Id.)
3. **PROMISE OF JUSTICE TO GRANT NEW TRIAL—POSTPONEMENT OF HEARING—DENIAL OF MOTION—INSUFFICIENT EXCUSE.**—The reliance of the plaintiff in the injunction suit, as defendant, in the justice's court, upon the promise of the justice to grant a new trial, which the plaintiff in the justice's court does not appear to have participated in or known, and the postponement of the hearing of the motion until after the expiration of the time for appeal, and the final denial thereof by the justice, cannot excuse the neglect of the defendant to appeal from the judgment, or entitle him to relief in equity against the judgment. (Id.)
4. **VOID SALE AND DEED—CLOUD ON TITLE.**—An injunction will not be granted to restrain the street superintendent of the city of Los Angeles from selling real property in that city under a void sale to satisfy a void assessment for opening a street in proceedings taken under the general law in 1898. His deed under such sale would be void, and would cast no cloud upon the plaintiff's title. (Byrne v. Drain, 663.)
5. **PLEADING—MULTIPLICITY OF SUITS.**—A mere naked averment in the complaint that the granting of the injunction will prevent a multiplicity of suits, which does not fairly appear from the nature of the subject matter, or from any facts averred, is not a sufficient ground to sustain the injunction. The fact that the owner of the land might be compelled to defend his title, or to prosecute an action to quiet an adverse claim, cannot support an injunction, but the fact that he may successfully do either is ground against the injunction. (Id.)

See Interpleader, 2.

INSANE PERSONS.

1. **STATE HOSPITAL—INSANITY LAW—QUALIFICATIONS OF MEDICAL SUPERINTENDENT.**—Under the "insanity law" of March 31, 1897, establishing a state lunacy commission for state hospitals, theretofore known as state insane asylums, the qualifications prescribed for the medical superintendent are imperative, and the board of managers of a state hospital cannot appoint a medical superintendent for the hospital, who has not had at least three years' experience in the care and treatment of the insane. (*People ex rel. Moore v. King*, 570.)
2. **RIGHTS OF FORMER SUPERINTENDENT.**—A new appointee, not possessing the qualifications prescribed by the law of 1897, cannot oust the former medical superintendent of the insane asylum, who has the requisite qualifications, though his term of office has expired, he being entitled to hold over as medical superintendent under the act of 1897 until a qualified successor takes his place. (*Id.*)
3. **INSANITY LAW CONSTITUTIONAL.**—The insanity law is not special legislation, nor devoid of uniform operation, nor does it embrace subjects not expressed in its title; but it is in all of these respects valid and constitutional. (*Id.*)

See Criminal Law, 40; Estates of Deceased Persons, 60; Guardian and Ward.

INSOLVENCY.

1. **INVOLUNTARY INSOLVENCY—INSUFFICIENT PETITION OF CREDITORS.**—A petition of creditors in involuntary insolvency against the members of a partnership, which alleges that the debtors made a transfer of their estate, with intent to defraud their creditors, and that in contemplation of insolvency they have made a payment and transfer of their estate, without stating that the first alleged transfer was made "being insolvent," or that the debtors are insolvent, or stating any time when they made any payment or transfer, or to whom it was made, or what property was transferred, is insufficient, both upon general and special demurrer, and cannot sustain an adjudication of insolvency. (*Matter of Mealy*, 103.)
2. **INSUFFICIENCY OF BOND—WAIVER OF OBJECTIONS.**—A bond not signed by two sureties and by all of the petitioning creditors as principals is insufficient; but objection thereto is waived if not made in the court below at the proper time, and cannot be urged upon appeal for the first time. (*Id.*)
3. **INSOLVENT BANK—VOLUNTARY LIQUIDATION—PREFERENCE OF CREDITOR.**—The resolution of an insolvent bank to go into liquidation is a voluntary act, which does not change the relative status of itself and its creditors, or preclude it from preferring one creditor above another, in the absence of actual fraud. (*Merced Bank v. Ivett*, 134.)

INSOLVENCY (Continued).

4. **CONSTRUCTION OF CODE AS TO PREFERENCE OF CREDITORS.**—Section 3432 of the Civil Code, which provides that "a debtor may pay one of the creditors in preference to another, or may give to one creditor security for the payment of his demand in preference to another," in the use of the broad term "debtor," includes corporations, as well as partnerships and individuals who are indebted, and gives to corporations equally with individuals the right to prefer one creditor above another. (Id.)
5. **ORDER RELATING TO CROP UPON HOMESTEAD—APPEAL RES ADJUDICATA—ACTION FOR VALUE OF CROP—ASSIGNEE SUED INDIVIDUALLY.**—An order denying the right of an insolvent debtor to the proceeds of a grape crop grown upon land claimed by him as a homestead, and affirming the right of the assignee thereto, is appealable; and upon failure to appeal therefrom within the time limited, it becomes *res adjudicata*, and is a bar to an action brought by the claimant of the land to recover the value of the crop against the assignee in his individual capacity. (Sunkler v. McKenzie, 554.)
6. **IDENTITY OF ACTION AND PARTIES.**—The final determination of a substantial matter of right upon a motion or petition upon which the interested parties have a right to be heard, is *res adjudicata*, where the same subject matter is sought to be litigated in an independent action; and the substantial identity of the two proceedings cannot be affected or destroyed by the fact that an assignee in insolvency was a party to the motion or petition for a fund held by the assignee in his official capacity, and is sued in the action, in his individual capacity, in relation to the same subject matter. (Id.)

See Corporations, 12, 13, 18, 19; Estoppel, 1-4; Mortgage, 26-30.

INSTRUCTIONS. See Criminal Law, 10, 21, 24-27, 39, 47, 50, 51, 63; Evidence, 8; Negotiable Instruments, 4, 5.

INSURANCE.

1. **FIRE INSURANCE—POLICY TO MORTGAGEE—NOTICE OF CHANGE OF OWNERSHIP—RECORD OF UNDELIVERED DEED—NONACCEPTANCE.**—Under a policy of fire insurance issued to a mortgagee, a condition that the mortgagee shall give notice of any change of ownership in the mortgaged property, is not broken by a failure to give notice of a recorded deed which was never in fact delivered to the grantee, and which he refused to accept, and which did not therefore result in a change of ownership. (Whitney v. American Ins. Co., 464.)
2. **DELIVERY OF DEED—QUESTION OF FACT—INTENTION OF BOTH PARTIES ESSENTIAL.**—The delivery of a deed is a question of fact, depending more upon the intention of the parties than upon the mode of fulfilling the intention. The intention both of the grantor and of the

INSURANCE (Continued).

grantee that the deed shall operate as a delivered instrument is essential to a delivery thereof. (Id.)

3. PROPOSITION FOR EXCHANGE—DEED TO THIRD PARTY—DELIVERY TO INTERESTED AGENT—REPUDIATION BY GRANTEE.—Under a proposition for the exchange of property, and for a deed to a third party in settlement of accounts against the proposer of the exchange, a delivery of the deed to the latter and his record thereof as agent of the grantee, while acting in his own interest, and without the knowledge or consent of the grantee or his subsequent approval, cannot operate as delivery to the grantee, and upon his repudiation of the transaction and refusal to accept the deed, no change of ownership is effected thereby. (Id.)
4. ASSUMPTION OF FIRE POLICIES BY NEW COMPANY—ASSENT OF POLICY-HOLDER—ACTION—PRIVITY OF CONTRACT.—The assumption of all the fire insurance policies of an insurance company by a new company is much broader than a mere naked contract of reinsurance under the code; and a holder of a policy issued by the former company sufficiently manifests his consent to the contract by which the payment of the policy was assumed by bringing an action against the new company upon the policy. The law creates the privity necessary for the maintenance of the action. (Id.)
5. JOINT LIABILITY OF COMPANIES.—The old company and the new company assuming its policies are jointly liable upon the policy, and may be sued thereupon as codefendants. (Id.)
6. REVOCATION OF AGENCIES OF OLD COMPANY—PROOF OF LOSS TO AGENTS OF NEW COMPANY.—Where all of the agencies of the old company were revoked and transferred to agents of the new company which assumed its policies, proof of loss directed to the company which issued the policy, and presented to the authorized agents of the new company within proper time after the fire, is sufficient as against both companies. (Id.)
7. FIRE INSURANCE—BREACH OF CONDITION OF POLICY—DEED TO AVOID PROBATE EXPENSES—LOSS AFTER DEATH OF INSURED.—Under a policy of fire insurance containing the usual provisions avoiding the policy in case of change of title in the property insured, a deed made by the insured person a few days before death to a brother in order to avoid probate expenses, without a transfer of the policy, avoids the policy from the time when the deed becomes effective, whether at its date, or at the death of the insured, and no recovery can be had thereupon by the administrator of the insured person for a loss occurring after the death. (Gillon v. Northern Assur. etc. Co., 480.)
8. NOTICE OF TRANSFER—GOOD FAITH.—Notice of the transfer given to the agent of the insurance company before the fire, and the good faith of the transfer cannot alter the effect of a violation of the condition of the policy, or aid the administrator of the insured person to recover upon the policy. (Id.)

INSURANCE (Continued).

9. **INSURANCE UPON PERSONAL PROPERTY—PREMATURE ACTION—PROOFS OF LOSS.**—Where, by the terms of the policy, it was not payable until sixty days after proofs of loss had been received by the company, an action to recover for the loss of personal property insured, brought within the period of sixty days after the presentation of the proofs of loss, is premature, and cannot be maintained. (Id.)
10. **WAIVER OF TIME FOR PROOF.**—The waiver of time limited for the presentation of proofs of loss is not a waiver of the requirement of proofs, nor of the condition for payment within sixty days after the making of the proofs of loss. (Id.)
11. **PLEADING—PRESENTATION OF PROOFS OF LOSS—WAIVER NOT ALLEGED.**—Where the complaint avers that the proofs of loss were presented more than sixty days before the commencement of the action, and does not aver or count upon a waiver of the proofs of loss, such waiver cannot be relied upon to sustain the action. (Id.)

INTEREST. See Corporations, 11; Estates of Deceased Persons, 11, 12, 36, 37; Negotiable Instruments, 3, 4.

INTERPLEADER.

1. **AMENDMENT TO CODE—DEPOSIT IN COURT.**—The amendment of 1881, added to section 386 of the Code of Civil Procedure, permits an action of interpleader to be maintained against conflicting claimants of personal property or of the right to the performance of an obligation in whole or in part, and does not require as a condition precedent to the action that the property or money involved shall be deposited in court at the commencement of the action, and an order requiring such deposit may be made pending the action. (Fox v. Sutton, 515.)
2. **BILL BY EXECUTOR—INTERPLEADER BETWEEN TRUSTEES AND DISTRIBUTEES—INJUNCTION AGAINST DISTRIBUTEES—PARTIES TO DECREE.**—In an action by an executor individually and in his official capacity to compel an interpleader between persons claiming a special fund, as trustees thereof, adversely to the estate, and who had brought an action against the executor to recover the fund, and other persons claiming the same fund as distributees of the estate, the plaintiff, upon paying the money into court under its order, is entitled to an injunction to prevent the distributees from enforcing the decree of distribution pending the action for an interpleader between them and the alleged trustees who were not parties to that decree and were not concluded thereby. (Id.)
3. **DISMISSAL AS TO PLAINTIFF—REVERSAL OF JUDGMENT BETWEEN LITIGANTS—COSTS UPON APPEAL—ORDER RESTRAINING EXECUTION—CERTIORARI—MANDAMUS.**—Where an action of interpleader involving a disputed right to a fund which the plaintiff deposited in

INTERPLEADER (Continued).

court was dismissed as to him, and the defendants litigated their respective claims to the fund, and, upon appeal from the final judgment, the interpleader was approved, and the judgment reversed as between the litigants, execution for the costs of appeal cannot issue against the plaintiff. An order restraining such execution cannot be annulled upon *certiorari*; nor will *mandamus* lie to compel the clerk to issue it. (*Long v. Superior Court of the City and County of San Francisco*, 686.)

INTERVENTION. See Appeal, 12; Receiver, 4.

IRRIGATION DISTRICT.

1. PUBLIC CORPORATION—OFFICERS.—An irrigation district is a public corporation, and its officers are public officers. (*Perry v. Otay Irr. Dist.*, 565.)
2. ASSESSMENTS COLLECTED—SALARY AND EXPENSES OF COLLECTOR—SETOFF.—Assessments collected by the collector of an irrigation district constitute a public fund, and not private property; and the collector cannot offset against such fund his claim for salary, commissions, and expenses paid out in litigation, but his claim therefor can only be paid out of the treasury after allowance by the board, and upon a warrant properly drawn therefor. (*Id.*)
3. ILLEGAL COLLECTIONS.—The fact that the moneys received by the collector for assessments were illegally collected cannot affect the duty of the collector to pay them over into the treasury of the district. If they were paid without protest, they cannot be recovered back; but, whether so or not, all moneys collected by the collector in his official capacity for and on behalf of the irrigation district belong to the district. (*Id.*)

JUDGMENT. See Appeal, 1-4, 7, 8, 13, 17-20; Assignment; Corporation, 12-15, 22, 23; Election, 8; Estates of Deceased Persons, 29; Estoppel, 1, 2, 4; Injunction, 1-3; Justice's Court, 1, 4, 5; Mechanic's Lien, 7, 8; Mortgage, 11-14; Summons, 3-5; Surety, 1-3, 5; Torts; Water and Water Rights.

JURISDICTION. See Guardian and Ward; Justice's Court; Mechanic's Lien, 7-9; Summons, 3-5.

JURY AND JURORS.

FEES OF JURORS IN CRIMINAL CASES—SAN FRANCISCO—CONSTRUCTION OF STATUTE.—A person who has served as a juror in criminal causes prosecuted in the superior court of the city and county of San Francisco, is not entitled to payment for such services out of the municipal treasury. Neither the act of March 5, 1870, nor the act of February 27, 1866, nor the consolidation act (*Stats.* 1856, p. 145), nor the act of March 28, 1895, confers any right to such payment. (*Birch v. Phelan*, 49.)

See Criminal Law, 34, 43-44, 65; Equity.

JUSTICE'S COURT.

1. **JURISDICTION—VACATING JUDGMENT BY DEFAULT—ANSWER SENT BY MAIL—FILING—ORDER NUNC PRO TUNC.**—A justice's court has no jurisdiction to interfere with its judgment except in the manner provided by law; and it has no power more than ten days after the entry of a judgment by default to vacate it upon the ground of mistake, surprise or excusable neglect of the defendant; nor has it jurisdiction, upon a motion of the defendant, made more than forty days after the judgment, to hear and determine issues of law and fact as to whether, after service of summons upon the defendant in another county, an answer addressed to the justice and sent by mail, and received by the constable, in the absence of the justice, had been filed prior to the default, or to order such answer filed *nunc pro tunc*. (*Simon v. Justice's Court*, 45.)
2. **ORDERS WITHOUT JURISDICTION—CERTIORARI.**—Orders of the justice's court declaring void the judgment by default, and staying execution thereon, and ordering the answer sent by mail to be filed *nunc pro tunc*, as of a date prior to the judgment, made more than forty days after its rendition, are without jurisdiction, and should be annulled upon *certiorari*. (*Id.*)
3. **PROMISSORY NOTE—ATTORNEYS' FEES—SPECIAL DAMAGE.**—Attorneys' fees, provided for in a promissory note in the event of suit, are in the nature of special damage under the contract. (*De Jarnatt v. Marquez*, 558.)
4. **ACTION IN JUSTICE'S COURT—JURISDICTION—VOID JUDGMENT.**—A justice's court has no jurisdiction of an action upon such a promissory note, where the amount of the principal sum and the attorneys' fees demanded under the contract exceed the sum of three hundred dollars; and the judgment rendered in such action is void. (*Id.*)
5. **JUDGMENT IN SUPERIOR COURT—APPEAL TO SUPREME COURT.**—Where the superior court, upon appeal from the void justice's judgment, tried the case, and rendered a judgment exceeding three hundred dollars, exclusive of interest, the supreme court has jurisdiction of an appeal from that judgment, even though it be void; and such an appeal cannot be dismissed for want of jurisdiction. (*Id.*)
6. **DISMISSAL OF APPEAL—SUFFICIENCY OF UNDERTAKING—FAILURE OF SURETIES TO JUSTIFY—ATTORNEY AS SURETY.**—The appeal to the supreme court from such judgment of the superior court cannot be dismissed upon the ground that the sureties upon the three hundred dollar undertaking upon appeal failed to justify, nor upon the ground that one of the attorneys of appellant became a surety upon the undertaking, in violation of a rule of the superior court. (*Id.*)
7. **VIOLATION OF RULE OF SUPERIOR COURT COGNIZABLE THEREIN.**—The violation of a rule of the superior court that an attorney for the

JUSTICE'S COURT. (Continued).

appellant shall not become a surety upon the undertaking on appeal is a matter cognizable before that court, to be dealt with as it may be advised. (Id.)

See Injunction, 2, 3.

LANDLORD AND TENANT.

1. **LEASE OF HOUSE—IMMORAL PURPOSES—KNOWLEDGE OF LESSOR.—VOID CONTRACT.**—A lease of a house for a term of years for the purpose of conducting it as a house of prostitution and assignation, with the knowledge and consent of the lessor, is unlawful and void; and a court will not aid either party in an attempt to enforce such a contract. (*Demartini v. Anderson*, 33.)
2. **EVIDENCE—BAD CHARACTER OF INMATES—REPUTATION OF HOUSE.**—Evidence is admissible to prove the bad character and reputation of the inmates and frequenters of the house leased, and to prove the reputation of the house as a house of ill-fame, both prior and subsequent to the date of the lease. (Id.)
3. **PRIOR REPUTATION—KNOWLEDGE OF LESSOR—ESTOPPEL.**—Evidence of the prior bad reputation of the house before the date of the lease is not only admissible as tending to show its reputation afterward, but also as tending to show the knowledge of the lessor, who may not shut his eyes to that which is patent to the community, and stop his ears from that which has become notorious among his neighbors, and say he has no actual knowledge. (Id.)

LARCENY. See Criminal Law, 14-17, 20-25.

LOS ANGELES. See Municipal Corporations, 3, 4.

MALICIOUS PROSECUTION.

1. **CHARGES OF MISDEMEANOR—BURDEN OF PROOF.**—In an action for a malicious prosecution by the defendant of the plaintiff in causing his arrest and prosecution upon a charge of misdemeanor, maliciously and without probable cause, the burden of proof is upon the plaintiff to show both malice and want of probable cause. (*Davis v. Pacific Tel. etc. Co.*, 312.)
2. **WANT OF PROBABLE CAUSE.**—In proving want of probable cause, the plaintiff must show that the arrest and prosecution were not under such circumstances as would justify the suspicion in a reasonable man that the charge was true. (Id.)
3. **WILLFUL CUTTING OF TELEGRAPH WIRES—WANT OF PROBABLE CAUSE NOT SHOWN.**—Where telegraph wires were willfully cut by the plaintiff under the advice of counsel for the purpose of testing the legality of wires erected and maintained under a franchise of the board of supervisors, and with the expectation of arrest therefor, probable cause appears for the prosecution, and the fact that the plaintiff was discharged in the police court does not establish a want of probable cause for the prosecution, nor require the submission to the jury of that question. (Id.)

MALICIOUS PROSECUTION. (Continued).

4. **RECOVERY LIMITED TO COMPLAINT—VARIANCE.**—A recovery can only be had upon the cause of action alleged in the complaint; and no recovery can be had upon some other and distinct cause of action developed by the proofs. (Id.)
5. **CHARGE OF MALICIOUS PROSECUTION—FALSE IMPRISONMENT NOT ALLEGED—INCONSISTENT CAUSES OF ACTION.**—Where the gist of the action, as brought, appears from the complaint to be a malicious prosecution for a misdemeanor, and an arrest therefor under legal process, there can be no recovery for a false imprisonment, which must proceed upon an allegation of arrest without legal authority, and no evidence upon the latter charge should be submitted to the jury, nor should any instructions be given thereupon. Each of these causes of action is distinct from the other, and the two are inconsistent with each other. (Id.)
6. **AUTHORITY FOR ARREST—PLEADING—PRESUMPTION.**—A private person, as well as an officer, may arrest another for a public offense committed or attempted in his presence, and where the complaint alleges that the plaintiff was charged with a criminal offense, and that the defendant procured a police officer to arrest the plaintiff, and does not allege that the arrest was without authority, it must be presumed to have been made by the officer upon a proper warrant, or by reason of the commission of the offense in the presence of the officer. (Id.)
7. **PLEADING—TERMINATION OF PROSECUTION.**—In an action for malicious prosecution, it must be alleged that the prosecution is at an end, either by alleging that the defendant was acquitted of the charge, or by alleging facts showing the legal termination of the prosecution complained of in favor of the defendant prior to the commencement of the action. (Carpenter v. Nutter, 61.)
8. **CHARGE OF FELONY—DISMISSAL BY JUDGE.**—In an action for the malicious prosecution of the plaintiff on a charge of felony, a complaint which, after setting out his commitment by a justice of the peace and the filing of an information against him in the superior court of a particular county, merely alleges that he was "released and discharged from custody and the information dismissed by the Hon. Joseph H. Budd, judge of the said superior court," is insufficient to show a legal termination of the prosecution, because the judge, acting as an individual and not in court, could not discharge the plaintiff or dismiss the information, and also because no facts were alleged negating the power of the court to direct another information to be filed against him, under sections 997, 999, and 1387 of the Penal Code. (Id.)

MANDAMUS. See Phonographic Reporter, 1.

MASTER AND SERVANT. See Negligence, 1-10.

MEASURE OF DAMAGES. See *Damages*.

MECHANIC'S LIEN.

1. **MATERIALS FOR CONSTRUCTION OF RAILROAD—CLAIM OF LIEN.**—A lien for materials used in the construction of a railroad must, in general, be claimed and enforced against the entire road, and not merely against that part thereof for which the materials were furnished. (*Brigham v. Knox*, 40.)
2. **SUFFICIENCY OF DESCRIPTION—NAME OF ROAD INDICATING PROPOSED TERMINUS—REFERENCE TO "PRESENT" TERMINUS—IMPLICATION.**—A claim of lien which stated that the claimant furnished certain materials which were used in the construction "of that certain railway known as and called the Sierra Valleys and Mohawk Railway" (Mohawk valley, in Plumas county, being its proposed westerly terminus), includes the entire railway by general description. A further particular description of the road as commencing at its easterly starting point and continuing through points specified "to its present westerly terminus," particularly described, which was twelve miles short of its proposed westerly terminus, is not inconsistent with the general description, but implies that the road was projected westerly beyond the described terminus, and the claim includes the then incompleted westerly extension of the railroad. (*Id.*)
3. **RECORD OF CLAIM—RAILROAD LYING IN TWO COUNTIES.**—The statute does not require the claim of lien to be recorded in each county in which the railroad is situated; and, where it lies in two counties, the claim of lien may be recorded in either county. (*Id.*)
4. **VOID CONTRACT—STATEMENT IN CLAIM—VALUE OF MATERIALS—CONTRACT PRICE.**—Where the contract for the construction of an extension of the railroad was void for want of record, the claim of lien may properly state the contract price for the materials, and such statement is a sufficient showing *prima facie* of their value. (*Id.*)
5. **PLEADING—ALLEGATION OF VALUE—CERTAINTY.**—The complaint for foreclosure of the claim of lien sufficiently alleges the value of the materials by alleging the contract price at which they are furnished in the absence of a demurrer for uncertainty. (*Id.*)
6. **PROOF OF VALUE—ADMISSION OF ANSWER.**—Where the averment of the complaint as to the contract price for the materials was neither specially demurred to nor denied by the answer, the value of the materials need not be proved at the trial. (*Id.*)
7. **INVALID CLAIMS OF LIEN—SEVERAL DEMANDS BELOW JURISDICTION—JOINT PERSONAL JUDGMENT.**—In an action to foreclose several mechanics' liens, where the demand of each claimant is less than three hundred dollars, if the liens claimed are invalid, and the equity jurisdiction to enforce them fails, the superior court has no jurisdiction to render a personal judgment against the owners of the land. Such judgment, if rendered, must be several and not joint; and

MECHANICS' LIEN. (Continued).

the several demands cannot be cumulated for the purpose of jurisdiction. A joint personal judgment in favor of several plaintiffs, for a sum in excess of three hundred dollars, the respective demands being severally less than that sum, cannot be sustained. (*Miller v. Carlisle*, 327.)

8. **INVALID CLAIMS OF LIEN—SEVERAL DEMANDS BELOW JURISDICTION—JOINT PERSONAL JUDGMENT.**—A joint personal judgment in excess of three hundred dollars, in favor of several plaintiffs, in an action to enforce mechanics' liens, where the several demands of each lien claimant were less than three hundred dollars, and the claims of lien were found invalid, held erroneous, and not within the jurisdiction of the superior court, upon the authority of *Miller v. Carlisle*, *ante*, p. 327. (*Miller v. Carlisle*, 331.)
9. **FORECLOSURE OF MORTGAGE—ATTORNEYS' FEES UPON APPEAL—JURISDICTION OF SUPERIOR COURT.**—Upon appeal from a judgment in an action to foreclose a mortgage, rendered in favor of certain defendants directing the payment of mechanics' liens claimed by them out of the proceeds of sale prior to the payment of plaintiff's mortgage, the appellate court will not pass upon the question of the allowance of attorney's fees for defending against the appeal by the plaintiff, but application for any further proper allowance for reasonable attorney's fees in the supreme court, under section 1195 of the Code of Civil Procedure, must be made to the superior court, which has jurisdiction to determine that question. (*Williams v. Gaston*, 641.)

See Corporations, 1-3.

MINES AND MINING.

1. **MINING CORPORATIONS—DISPOSITION OF "MINING GROUND"—RATIFICATION BY STOCKHOLDERS—CONSTRUCTION OF STATUTE.**—The act of April 23, 1880, "for the further protection of stockholders in mining corporations," requiring that any disposition of its "mining ground" must be ratified by the holders of at least two-thirds of its stock, does not import that its "mining ground" shall be subject to mineral entry, or shall be valuable for mineral deposits in the sense of the federal statutes relating to public lands, but applies to any ground acquired by such corporation for mining purposes, and subjected by it in good faith to the ordinary process of mining with a view to utilize the product for commercial purposes, regardless of the chemical or geological character of the article mined, and regardless of whether the mining is at a profit or at a loss, or whether sound judgment would or would not approve of that use of the land. (*Johnson v. California Lustral Co.*, 283.)
2. **MORTGAGE ON "PAINT-STONE" MINE—MEANING OF TERM "MINING GROUND."**—A mortgage on ground owned and mined by a mining corporation, for rock called "lustral," or "paint-stone," which is worked by the ordinary process of mining and pulverized in a mill,

MINES AND MINING (Continued).

and the product sold to be used in the manufacture of paint, is a mortgage on "mining ground" within the meaning of the statute, and is not valid unless ratified by the holders of at least two-thirds of the capital stock. (Id.)

3. **STATUTE LIMITED TO "MINING GROUND."**—The act of April 23, 1880, is limited in its operation to the "mining ground" of the mining corporation, and the appurtenances connected therewith, and does not apply to other real property of the corporation. (Id.)
4. **MINING CORPORATIONS—ACT FOR PROTECTION OF STOCKHOLDERS—CHANGE OF PENALTY—INDEPENDENT PROVISION—CONSTITUTIONAL LAW.**—The change of penalty by the amendment of 1897 to the act of 1874, for the protection of stockholders of mining corporations, so as to limit the recovery for the failure of the directors to post monthly accounts, and weekly statements of superintendents, to the actual damage alleged and proved, is a valid and independent provision, not affected by the question whether the amendment of 1897 is in part unconstitutional, either because it includes foreign corporations not embraced in the title, or because it makes an arbitrary classification of corporations whose stock is listed and offered for sale at public exchange. (Johnson v. Tautphaus, 605.)

See Corporations, 9, 10; Partnership, 4-6; Trusts, 5-7.

MISTAKE.

1. **MISREPRESENTATIONS AS TO TIME FOR REDEMPTION—EMPLOYMENT OF DEFENDANT'S ATTORNEYS—REFUSAL OF TENDER—FRAUD—EQUITABLE RELIEF.**—Where the plaintiff, in an action to foreclose a mortgage executed prior to 1897, employed the defendant's attorneys to make the bid at the sale, and misrepresented through them to the defendant that he had twelve months in which to redeem, and defendant, relying on the truth of the representations, neglected to redeem within six months, as he otherwise would have done, and tendered a full redemption within the twelve months, the refusal to accept the tender operated as a fraud upon the defendant, and he is entitled to equitable relief, regardless of whether the misrepresentations were fraudulently or honestly made. (Benson v. Bunting, 532.)
2. **EQUITABLE ESTOPPEL OF PLAINTIFF.**—In such case, the plaintiff is equitably estopped to insist upon the statutory period, on the ground that the defendant was lulled by the plaintiff's assurances into a false security, notwithstanding the assurances were not in writing, and were made without consideration. (Id.)
3. **MUTUAL MISTAKE AS TO THE LAW.**—A plain and acknowledged mistake of law is not beyond the reach of equity; and where all parties understood the law alike, all making the same mistake, and where the mistake operates to deprive one of the parties of a valuable right, such as that of redemption, and to give to the other party

MISTAKE (Continued).

a material advantage not contemplated by either, a court of equity will adjust their rights as though the law relating thereto was in fact as the parties supposed it to be, if necessary to do justice between them. (Id.)

See Estates of Deceased Persons, 26, 27.

MONEY HAD AND RECEIVED.**ACTION FOR MONEY HAD AND RECEIVED—EQUITY AND GOOD CONSCIENCE.**

—An action for money had and received is based upon the principle that one party has money which in equity and good conscience belongs to another; and, where the defendant has no money which belongs in equity and good conscience to the plaintiff, the action cannot be maintained. (County of Sacramento v. Southern Pac. Co., 217.)

See Equity.

MORTGAGE.

1. **ESTATE OF DECEASED PERSON—MORTGAGE BY EXECUTOR—ORDER FOR MORTGAGE—NOTE.**—Under section 1578 of the Code of Civil Procedure, prescribing the proceedings requisite in order to mortgage real property belonging to the estate of a deceased person, a promissory note and mortgage of such property, executed by the executor in pursuance of an order of the court, are not invalidated merely because the order directing the execution of the mortgage omitted to direct the execution of the note. (Fast v. Steele, 202.)
2. **DATE OF PAYMENT.**—An order made under said section, directing that the mortgage should be made payable "on or before two years" after its date, is complied with by the execution of a note and mortgage which are made payable "on or before one year" after their date. (Id.)
3. **ORAL DIRECTIONS OF JUDGE.**—An oral direction made by the judge to the executor, at the time of making the order, instructing him to pay or individually secure the interest to become due on the note which was to be secured by the mortgage, does not affect the rights of the mortgagee, if he was without knowledge or notice of such direction. (Id.)
4. **NOTE—MORTGAGE AS COLLATERAL SECURITY—FORECLOSURE—BID IN INTEREST OF PRINCIPAL DEBTOR—ACCOUNTING—TRUST.**—Where a loan evidenced by a note given by direction of the lender to his agent was collaterally secured by a note and mortgage for a much larger sum assigned to the same agent, which was foreclosed by the agent under an agreement with the principal debtor that the bid should not be less than the amount thereof for his benefit, such debtor is not entitled to demand an accounting and payment of the surplus of the collateral note and mortgage above the original debt secured, and a decree declaring that the land purchased under the foreclosure, and the deficiency judgment therein, are held in trust

MORTGAGE (Continued).

by the agent as security for the principal debt, and refusing an accounting, will be affirmed upon appeal of the debtor therefrom. (Hoult v. Ramsbottom, 171.)

5. **COLLECTION OF COLLATERAL SECURITY—RIGHT OF DEBTOR TO ACCOUNTING.**—The holder of a mortgage as collateral security may foreclose the lien, and if he does so of his own motion, without fraud, he takes the absolute legal title to the property free from any trust therein, and must account to the debtor for the proceeds, if there is any surplus thereof. But where the bid is made larger than it otherwise would be at the request of the debtor, and for his benefit in respect of the amount of the excess, it would be inequitable to compel an accounting of the surplus, which existed only by reason of the act of the debtor; and he must be limited in such case to a right of redemption upon paying the principal debt, or to a right to have the trust property sold and the proceeds ratably apportioned. (Id.)
6. **HARMLESS REJECTION OF EVIDENCE.**—The rejection of evidence as to the relations between the lender and his agent, which could not in anywise prejudice the rights of the appellant, under the findings and decree entered in his favor, or entitle him to any relief other or greater than that awarded, cannot be ground for reversal upon his appeal. (Id.)
7. **FORECLOSURE—MATURITY—ELECTION BY MORTGAGEE—STIPULATED DISMISSAL OF ACTION—STATUTE OF LIMITATIONS.**—Under a mortgage providing for an election of the mortgagee upon nonpayment of interest for thirty days to treat the mortgage as due and to foreclose it, where a former action of foreclosure was dismissed by stipulation upon payment of all interest then due, in discharge of the default, and interest was thereafter paid for several years, the statute of limitations against a second action brought after maturity of the note does not begin to run from the commencement of the first action, but only from the maturity of the note. (California Sav. etc. Soc. v. Culver, 107.)
8. **PROVISION FOR BENEFIT OF MORTGAGEE—WAIVER OF PENALTY.**—The provision for foreclosure by the mortgagee, at his election, upon default of interest, is for his benefit, and the mortgagor cannot claim that the note secured is due until its maturity. The mortgagee may waive the penalty for the default; and the bringing of a foreclosure suit does not put it out of his power to waive the penalty, by accepting a payment of all interest due and dismissing the action. (Id.)
9. **ESTOPPEL OF MORTGAGOR.**—The mortgagor, having claimed that all interest was paid prior to the commencement of the first action, and afterward, upon payment of interest to the date of dismissal, having stipulated with the mortgagee for dismissal thereof, and

MORTGAGE (Continued).

- having continued to pay interest thereafter, is estopped from setting up the statute of limitations as having run from the date of the first action against another action to foreclose the mortgage after maturity of the note. (Id.)
10. **MORTGAGE BY DEED ABSOLUTE—TITLE OF MORTGAGOR.**—In this state a deed absolute in form, but intended as a mortgage, is a mortgage, and conveys no title to the grantee named in the instrument. (*Byrne v. Hudson*, 264.)
11. **ACTION TO DECLARE DEED A MORTGAGE—POWER OF COURT—STRICT FORECLOSURE—ERRONEOUS JUDGMENT.**—In an action to have it adjudged that a deed from plaintiff's grantor to the defendant is a mortgage, the court, after having found that it is a mortgage, has no power under our system to make a strict foreclosure thereof in the action, and to bar and destroy plaintiff's equity of redemption and other right to the property at the end of twenty days after written notice of the judgment, if the mortgage should not then be paid. Such a judgment is erroneous, though, perhaps, not void, if not appealed from. (Id.)
12. **WRITTEN NOTICE OF JUDGMENT—FORFEITURE OF RIGHTS.**—The provision in the judgment for a forfeiture of the plaintiff's rights within twenty days after written notice of the entry of the judgment, if no redemption should be made within that period, must be construed as requiring a separate written notice expressly intended for the purpose of starting the period of time mentioned in the judgment. (Id.)
13. **INCIDENTAL RECITAL IN NEW TRIAL NOTICE—KNOWLEDGE OF JUDGMENT.**—A mere incidental recital of the rendering of the judgment in a notice of motion for a new trial is not a sufficient compliance with the terms of the judgment respecting written notice; nor is the actual knowledge by plaintiff of the rendition of the judgment material upon the question of such compliance. (Id.)
14. **FINAL JUDGMENT BARRING PLAINTIFF'S RIGHTS—APPEAL.**—A subsequent judgment assuming to bar the plaintiff from all equity of redemption or other right to the mortgaged premises, and dismissing the action for noncompliance with the terms of the judgment as to the time for redemption, is a final judgment as respects the rights of the plaintiff, and is appealable by the plaintiff as such. (Id.)
15. **CORPORATIONS—VACANCY IN BOARD OF DIRECTORS—CORPORATE ACT BY MAJORITY OF FULL BOARD—VALIDITY OF MORTGAGE.**—Notwithstanding a vacancy in the board of directors of a corporation organized under the laws of this state, it seems that a vote of a majority of the full board is valid as a corporate act to sanction the execution of a mortgage upon property conveyed to the corporation by the mortgagee. (*Porter v. Lassen County Land etc. Co.*, 261.)

MORTGAGE (Continued).

16. **RATIFICATION OF MORTGAGE BY FULL BOARD.**—The subsequent action of a full board requiring the mortgagee to make additional advances on the security of his mortgage, and recognizing its validity in a resolution authorizing a second mortgage upon the property, is a full ratification of the first mortgage. (Id.)
17. **PLEADING OF MORTGAGE BY CORPORATION—PROOF OF RATIFICATION.**—Where a mortgage executed by the corporation is pleaded, proof of a subsequent ratification is as pertinent to support the allegation as proof of a prior authorization. (Id.)
18. **INCOMPETENCY OF ONE DIRECTOR TO ACT.**—The incompetency of one director to act, by reason of his interest in the transactions leading to the conveyance of the property to the corporation, and to the execution of the mortgage by the corporation, cannot affect the validity of the original authorization of the mortgage by a majority of the full board of directors to which his vote was not necessary, nor affect the subsequent ratification of the mortgage by a newly elected full board of directors, of which he was a member. (Id.)
19. **SECURITY FOR ADVANCES—DEMAND AND REFUSAL—FRAUD.**—Where the mortgagee did not bind himself by the terms of the mortgage to make further advances which were provided for therein, excepting such advances within a specified limit as might be required to compromise any hostile claim to the mortgaged property, when requested so to do by the corporation, a mere demand by the corporation for further advances without reference to such a compromise, and a refusal to make the advances demanded, does not show any fraud committed by the mortgagee upon the corporation. (Id.)
20. **PLEADING—VARIANCE—EXCLUSION OF EVIDENCE.**—Where the answer alleged merely a demand by the corporation for further advances, and a refusal by the mortgagee to make any further advances, an offer to prove a demand for an advance to carry out a compromise of a hostile claim is properly refused, and evidence thereof properly excluded, upon the ground that it had not been pleaded. (Id.)
21. **REFUSAL TO MAKE PROMISED ADVANCES—RECOUPMENT—PLEADING.**—The refusal of the mortgagee to make promised advances cannot render the mortgage wholly void and incapable of enforcement; but the mortgagor, in such case, can only recoup the actual damage shown to have resulted from the breach of that stipulation in the contract, under a pleading justifying such recoupment. (Id.)
22. **APPLICATION OF ADVANCES.**—The mortgagee is not bound to see that advances made by him to be expended in the care and preservation of the mortgaged property are so expended by a representative of the corporation to whom the advances are properly paid. (Id.)

MORTGAGE (Continued).

- 23. CONSIDERATION OF MORTGAGE—ADVANCES INURING TO BENEFIT OF CORPORATIONS.**—A mortgage executed to secure advances made by the mortgagee for the care and preservation of the property of the corporation, and of trust property which inured to its benefit, and which was conveyed to it by the mortgagee, has a sufficient consideration for its support. (Id.)
- 24. AGREEMENT WITH OWNER OF STOCK PERSONALLY—CONVEYANCE OF TRUST PROPERTY—CORPORATE PROPERTY—ASSUMPTION OF LIABILITIES BY CORPORATION.**—The consideration of the mortgage is not affected by the facts that the mortgagee became trustee of lands conveyed to him as security for advances thereupon under a personal contract made with the owner of nearly all of the stock of the corporation, who was then acting in his own name, but for the benefit of the corporation (the corporation being then dormant), and that such owner assumed to convey to said trustee as security the property which then belonged to the corporation, and that such property, together with the other property held in trust, was conveyed by the trustee to the corporation, after assumption by it of all the acts and liabilities of the owner of such stock, without dispute as to their correctness. (Id.)
- 25. CHATTEL MORTGAGE—NECESSITY OF RECORD—INVALIDITY AS TO CREDITORS.**—The record of a chattel mortgage upon personal property pursuant to section 2957 of the Civil Code is intended to take the place of the immediate delivery and continued change of possession of personal property required in other cases of transfer by section 3440 of that code; and if the mortgage is not acknowledged or proved, certified, and recorded as required by section 2957, it is void as to the creditors of the mortgagor. (*Ruggles v. Cannedy*, 290.)
- 26. PROMPT RECORD ESSENTIAL—INSOLVENCY OF MORTGAGOR—DELAYED RECORD—SUBSEQUENT CREDITORS—ACTION BY ASSIGNEE.**—A prompt record of the chattel mortgage is essential in order to make it valid as against the creditors of the mortgagor; and where the record thereof was delayed for more than six months, and was made only two days prior to the adjudication in insolvency of the mortgagor, the mortgage is void, especially as to the subsequent creditors of the mortgagor, who, without notice of the mortgage, rendered credit to him; and the assignee in insolvency, representing such creditors, who have proved their claims, may maintain an action to have the mortgage adjudged null and void as to them. [*Garoutte, J., Van Dyke, J., and Harrison, J., dissenting.* (Id.)
- 27. GENERAL RIGHTS OF CREDITORS—SPECIFIC LIEN OR INTEREST.**—In general, a creditor at large cannot set aside a chattel mortgage for want of record, or any transfer of personal property for want of an immediate delivery and change of possession, if he has not first acquired an attachment lien, or a judgment and levy under execution or some specific interest in the mortgage property. (Id.)

MORTGAGE (Continued).

28. **PREVENTION OF SUIT BY INSOLVENCY—PROOF OF CLAIMS AGAINST INSOLVENT DEBTOR—REPRESENTATION OF INTEREST BY ASSIGNEE.**—Where creditors of an insolvent mortgagor of personal property are prevented from suing by reason of the adjudication of his insolvency, and are limited to the proof of their claims against him, such proof is the equivalent of a judgment, and shows sufficient interest of the creditors in the mortgaged property to warrant the assailing of the chattel mortgage as a void act for want of prompt record, and the assignee in insolvency represents the interest of the creditors, and may recover the property for their benefit. (Id.)
29. **VOLUNTARY INSOLVENCY—EFFECT OF ADJUDICATION.**—Where the debtor goes into voluntary insolvency, the adjudication in insolvency, in the absence of a showing to the contrary, is sufficient proof of the inadequacy of the property to pay the debts in full to justify a proceeding, on behalf of the creditors, to avoid a transfer or chattel mortgage which is void as to the creditors. (Id.)
30. **CODE PROVISIONS AS TO ASSIGNEE—GENERAL POWER UNDER INSOLVENT ACT.**—The inclusion of the assignee in insolvency in section 3440 of the Civil Code, and the omission to refer to him in section 2957 of that code, does not affect the general power of the assignee in insolvency conferred by the Insolvent Act to represent the insolvent estate, and to maintain suits for the benefit of the creditors of the insolvent debtor in cases arising under section 2957. (Id.)
31. **SALE UNDER FORECLOSURE—TIME FOR REDEMPTION—CHANGE OF STATUTE.**—The change of the statutory time for redemption from six months to twelve months by the amendment of 1897 to section 702 of the Code of Civil Procedure did not affect the time for redemption under foreclosure of a mortgage executed prior to that amendment. (Benson v. Bunting, 532.)
32. **ACTION UPON NOTE—RECITAL OF MORTGAGE IN NOTE—PLEADING—PRIMA FACIE EVIDENCE—NONSUIT.**—In an action upon a note which contains a recital that it is secured by mortgage, though such recital may not be sufficient as a statement of fact in a pleading, yet when the note was offered in evidence, the recital became *prima facie* evidence of the fact stated, and a nonsuit was properly granted, upon the ground that the note was secured by mortgage, and that no action was brought to foreclose it. (Hibernia Sav. etc. Soc. v. Thornton, 575.)
33. **ASSUMPSIT—DEFENSE—CONVEYANCE OF REAL PROPERTY TO PLAINTIFF—PAYMENT—SECURITY—SALE AND APPLICATION OF PROCEEDS.**—It is a defense to an action of *assumpsit* for money paid for the use of the defendant at his request, that the defendant conveyed real property to the plaintiff either in payment of the debt, or by way of security, for the purpose and intention that the plaintiff should sell the property and apply the proceeds to the payment

MORTGAGE (Continued).

of the indebtedness, and that plaintiff has not exhausted the security. (*Hodgkins v. Wright*, 688.)

34. **ABSOLUTE CONVEYANCES TO SECURE DEBT—CONTRARY STIPULATIONS IMMATERIAL.**—Conveyances, absolute in form, given in fact to secure the payment of a debt, are mortgages, subject to foreclosure and to the right of redemption, no matter how expressly the parties have stipulated that they shall not be so deemed, or that, in case of a failure to pay, the title of the mortgagee shall be absolute, and that no foreclosure need be had, and that the debtor does not intend to redeem. (*Id.*)
35. **TRUST DEEDS—ABSENCE OF WRITING—PAROL EVIDENCE—PROOF OF MORTGAGE SECURITY.**—Conveyances absolute in form may be shown by evidence to be mortgages, but not to be trust deeds to secure indebtedness from the grantor to the grantee. Trusts in real estate, other than resulting trusts, can be created only by writing; and oral evidence that it was intended that the grantee should sell the property and give the grantor credit for the proceeds, does not establish an express trust, but indicates a mortgage security. (*Id.*)
36. **DOCTRINE AND EFFECT OF TRUST DEEDS—PERSONAL ACTION.**—The doctrine of trust deeds to secure indebtedness will not be extended to deeds which are not expressly of that character. In effect, they are mortgages with power to sell, though not requiring foreclosure. It seems that one who has conveyances which are expressly trust deeds to secure indebtedness cannot bring a personal action until the security is exhausted. (*Id.*)
37. **FORECLOSURE OF MORTGAGES—CROSS-COMPLAINT—MORTGAGES OF DISTINCT TRACTS TO SECURE ONE DEBT—NEW PARTIES.**—In an action to foreclose two several mortgages executed by each of the makers of a joint and several note to plaintiff, upon his individual property, a subsequent mortgagee, made a party defendant, who holds a note of one of the same makers, secured by a mortgage executed by him and a third person upon a larger tract, and also secured by a subsequent mortgage executed by the same maker upon a wholly distinct tract, may, by cross-complaint, foreclose both of his mortgages, bringing in whatever new parties are necessary to such foreclosure. It is error to strike out from the cross-complaint allegations concerning the mortgage upon the distinct tract securing the same debt secured by the mortgage of the larger tract, which included premises covered by one of the plaintiff's mortgages. (*Stockton Sav. etc. Soc. v. Harrold*, 612.)
38. **LOSS OF LIEN NOT FORECLOSED.**—If the defendant were to sue in an independent action of foreclosure, he would lose the lien of the mortgage of the distinct property securing the same debt, if it were omitted from the foreclosure; and he cannot be compelled to lose part of his security, when foreclosing his mortgages by way of cross-complaint. (*Id.*)

MORTGAGE (Continued).

39. RIGHT OF CROSS-COMPLAINANT—ADDITIONAL LAND—NEW PARTIES.—

The provision in section 442 of the Code of Civil Procedure for a cross-complaint, where affirmative relief is sought affecting the property to which the action relates, only requires that there shall be some connection between the cause of action in the cross-complaint and the property to which the action relates; and the fact that the cause of action of the defendant includes additional land as well as that with which the plaintiff is concerned, and the further fact that new parties are brought in by the cross-complaint, are not tenable objections thereto. (Id.)

40. MORTGAGE OF DISTINCT LAND SECURING DISTINCT NOTES—RESTRICTION OF FORECLOSURE BY CROSS-COMPLAINT—DECREE SAVING LIEN.—

Where the mortgage of the distinct tract of land not included in the complaint not only secured a joint note, which was also secured by a mortgage inclusive of part of the land described in the complaint, but also secured a wholly distinct note of one of the parties to the joint note, it cannot be foreclosed by cross-complaint, so far as respects such distinct note; but the decree of foreclosure should save from the effect of the sale the lien of the mortgage securing such distinct note. (Id.)

41. SUCCESSIVE FORECLOSURES—CONSTRUCTION OF CODE.—Section 726 of the Code of Civil Procedure, providing that there shall be but one action to recover any debt secured by mortgage, does not prohibit successive foreclosures for distinct debts secured by the same mortgage when the circumstances render that course proper. (Id.)

See Estates of Deceased Persons, 15-17, 23-27, 45; Executions; Insurance, 1; Mechanic's Lien, 9; Mines and Mining, 2; Mistake, 1; Negotiable Instruments, 7; Replevin, 1, 2; Summons, 4, 5.

MUNICIPAL CORPORATIONS.

1. CONTROL OF CHARTER BY GENERAL LAWS—CONSTRUCTION OF CONSTITUTION—SUSPENSION OF CHARTER PROVISIONS.—Section 6 of article XI of the constitution as it stood prior to the amendment of 1896, providing that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by the authority of this constitution, shall be subject to and controlled by general laws," is not to be construed as providing that charter provisions shall be repealed by a general law upon the same subject matter, but only that the operation of the inconsistent charter provisions shall be suspended during the paramount operation of the general law. (Byrne v. Drain, 663.)

2. AMENDMENT OF CONSTITUTION—EXCEPTION OF MUNICIPAL AFFAIRS—RETROSPECTIVE OPERATION—RESTORATION OF CHARTER PROVISIONS.—The amendment of 1896 to section 6 of article XI of the constitution,

MUNICIPAL CORPORATIONS (Continued).

inserting the words "except in municipal affairs," was retrospective in its operation, and applied to all existing charters. It had the effect to remove the paramount control of general laws in respect to municipal affairs, and to restore the operation of municipal charters in respect to such affairs, which were suspended by general laws prior to that amendment. (Id.)

3. **OPENING AND WIDENING STREETS—GENERAL LAW OF 1899—CHARTER OF LOS ANGELES.**—The opening and widening of streets are "municipal affairs" within the meaning of the constitution; and the provisions of the charter of Los Angeles on that subject matter which were suspended by the general law of March 6, 1889, were relieved from the control of that statute by the amendment of 1896 to section 6 of article XI of the constitution. (Id.)
4. **VOID ASSESSMENT UNDER GENERAL LAW.**—The general law of March 6, 1889, having ceased to be operative in the city of Los Angeles, in 1896, an assessment thereafter made in that city based upon proceedings taken under the general law, and not under the charter, is void. (Id.)

See Counties; Game; Irrigation District; Schools; Street Assessment; Taxation.

MURDER AND MANSLAUGHTER. See Criminal Law, 26-40.

NAMES. See Criminal Law, 41, 42, 61, 62.

NATIONAL BANK. See Attachment.

NEGLIGENCE.

1. **EVIDENCE OF NEGLIGENCE—INTERPRETATION FOR PLAINTIFF—INJURY IN UNTIMBERED TUNNEL.**—Upon a motion for nonsuit in an action by an employee to recover damages suffered from the falling of a rock in an untimbered tunnel, evidence that timbers were required to make the tunnel reasonably safe is to be taken in connection with other evidence which, though susceptible of two constructions, may be interpreted in favor of the plaintiff, to the effect that no timbers were provided for use in the tunnel, and that the injury was in a completed part of the tunnel, and such interpretation of the evidence must be taken as true for the purposes of the motion. (Hanley v. California Bridge etc. Co., 232.)
2. **QUESTIONS OF FACT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS.**—The question as to the negligence of the defendant and the contributory negligence of the plaintiff or his assumption of the risks of his employment, with full knowledge of its dangers, must be left to the jury as questions of fact to be determined by them, and not disposed of as questions of law upon motion for a nonsuit, where it cannot be said that all reasonable men must draw the same inference as to the freedom of the defendant from negligence,

NEGLIGENCE (Continued).

or as to the contributory negligence of the plaintiff, or assumption of risks by him. (Id.)

3. **MASTER AND SERVANT—DUTY OF MASTER TO PROVIDE SAFE PLACE—PERMANENT TUNNEL—FALL OF OVERHANGING ROCK.**—The rule of law requiring the master to provide a safe place in which his servants may work applies to the construction of a permanent tunnel in a mountain, and it is the duty of the master, in so far as the work therein is completed, to make the tunnel reasonably safe, so as to prevent the fall of overhanging rock. (Id.)
4. **ACTION OF FELLOW-SERVANTS.**—The rule as to the erection of temporary structures by fellow-servants has no application to the construction of a permanent tunnel; and the fact that fellow-servants are engaged in such construction cannot relieve the defendant from his duty to provide a safe place for his servants. (Id.)
5. **RIGHTS OF SERVANT—PRESUMPTION.**—The servant has a right to presume that the master has performed his duty in making the place in which he is directed to work reasonably safe, and to proceed upon that presumption, unless a reasonably prudent person, in performing the work assigned to him, would have learned facts from which he would have apprehended danger to himself. (Id.)
6. **INEXPERIENCED SERVANT—UNOBVIOUS DANGER—ABSENCE OF WARNING—CONTRIBUTORY NEGLIGENCE.**—An inexperienced servant is not chargeable as matter of law with contributory negligence, where the danger to him was not so obvious and threatening that a reasonably prudent person in his situation would have avoided it, and where he had no warning of the danger occasioned by the fault of the defendant in not providing a safe place in which to work. (Id.)
7. **MASTER AND SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK.**—Notwithstanding the negligence of a master in furnishing the servant with defective appliances, the servant assumes the risk of working therewith, and impliedly agrees to release the master from liability therefor, if he either continues to use them with knowledge of their dangerous character and without objection or protest, or continues to use them with like knowledge for an unreasonable time, after notification given to the master of their defective character, and after the servant has no right to expect that the defect will be remedied. (Id.)
8. **LAPSE OF UNREASONABLE TIME—QUESTIONS OF FACT AND LAW.**—Generally, the question of reasonable time is one of fact for the jury; but where it appears, without conflict in the evidence, that the servant continued his employment for nine months after notification to the master of the defective appliance, and without any intimation from the master that the defect would be repaired, during

NEGLIGENCE (Continued).

all of which time the defect was obvious to his senses, the delay is unreasonable as matter of law, and is fatal to his cause of action for injury resulting from the defect. (Id.)

9. EVIDENCE—REMEDY OF DEFECT AFTER ACCIDENT.—In an action for negligence of a master in furnishing defective appliances, evidence is not admissible to show that the defects were remedied after the accident. (Id.)
10. EXPERT EVIDENCE—SAFETY OF APPLIANCES.—It is not proper, in such an action to admit the testimony of expert witnesses as to what appliances were safe, and what were unsafe. A master is not bound to furnish the safest appliances. The jury is the proper judge of the safety of the appliances actually used; and the safety of other appliances is immaterial. (Id.)
11. PROXIMATE CAUSE—UNLAWFUL SPEED OF ELECTRIC-CAR—BREAKING OF FLANGE—QUESTION FOR JURY.—The running of an electric-car at an unlawful rate of speed is evidence of negligence, though not *per se* of the proximate cause of injury to the plaintiff; but where the evidence shows that the plaintiff was precipitated from his seat and thrown wholly across the car through a window on the opposite side thereof, to the ground, owing to the breaking of the flange of a wheel upon a curved track, and the throwing of the car violently from the track, it cannot be said as matter of law that the unlawful speed of the car was not the proximate cause of the injury. That question is for the jury to determine from the evidence, and it is their province to decide whether the plaintiff would not have been injured as he was if the car had been traveling at an ordinary and lawful rate of speed. (Johnsen v. Oakland etc. Ry., 608.)
12. LATENT DEFECT IN WHEEL.—The fact that there was a latent defect in the wheel, not discovered or known to exist, after the best-known tests were applied, is not necessarily a complete defense to the action; and is not ground for setting aside the verdict for the plaintiff, which may have been properly based upon a finding that the unlawful speed of the car was the proximate cause of the injury complained of. (Id.)
13. OPINION EVIDENCE OF PASSENGERS—SPEED OF CAR.—The testimony of passengers who were riding on the car at the time of the accident, and who were regular travelers upon this line, the schedule and statutory time of which was eight miles per hour, to the effect that the car was going very fast, and at an unusual rate of speed, was proper evidence to go to the jury. The law recognizes a very broad and liberal rule in the reception of opinion evidence of non-experts as to the rate of speed at which cars may be traveling. (Id.)

See Estates of Deceased Persons, 12, 27.

NEGOTIABLE INSTRUMENTS.

1. **PROMISSORY NOTE—EXTENSION OF TIME FOR PAYMENT—ORAL AGREEMENT.**—The time for the payment of a promissory note past due cannot be extended for a definite period, so as to bind the payee, by an unexecuted oral agreement that the maker shall pay the interest monthly, according to the terms of the note, for such period. (*Henahan v. Hart*, 656.)
2. **ACTION UPON NOTE—SECURITY FOR OVERDRAFT—PLEADING—NONPAYMENT OF OVERDRAFT AND NOTE.**—In an action by a bank upon a promissory note given by the defendants to secure the bank against an overdraft by a partnership firm, a complaint alleging that between the making and delivery of the note, and the time of its maturity, the overdraft by the firm greatly exceeded the amount of the note, and that no part of the overdraft, or of the principal sum or interest of the note has been paid, states a cause of action and shows a liability of the defendants to the plaintiff for the full face value of the note. (*County Bank of San Luis Obispo v. Greenberg*, 26.)
3. **INTEREST UPON OVERDRAFT—AMOUNT OF NOTE—VERDICT.**—Where the amount of the overdraft, with interest thereon at the legal rate, after crediting all payments, exceeded the full amount of the note bearing interest at ten per cent per annum, payable quarterly, and compounded at the same rate, to the date of the verdict, the verdict should be for the full amount of the note, but for no sum in excess thereof. (*Id.*)
4. **REFUSAL OF INSTRUCTION AS TO RATE OF INTEREST—HARMLESS RULING.**—The refusal of an instruction requested by the appellant as to the rate of interest to be charged in the absence of a special agreement cannot be held injurious to the appellant if the record contains no specification of the insufficiency of the evidence to sustain the verdict in the allowance of legal interest on the overdraft, and if there is no question on the evidence that the amount of the overdraft and legal interest equaled the amount of the note, and appellant at the trial recognized that legal interest should be allowed on the overdraft, in computing the amount of the verdict on the note. (*Id.*)
5. **AMOUNT OF OVERDRAFT—CONTINUED TRANSACTIONS—VARYING AMOUNT—CONCRETE OBLIGATION—MISLEADING INSTRUCTIONS.**—The note to secure the amount of the overdraft contemplated continuing transactions with the bank, and a varying amount of overdraft from time to time; but it secured whatever overdraft existed at the maturity of the note, not exceeding the amount of the note and accrued interest. The overdraft thus secured was treated by the parties, and should be treated at the trial, as one concrete obligation; and offered instructions based upon the theory of several obligations for the overdrafts were properly refused as misleading. (*Id.*)

NEGOTIABLE INSTRUMENTS. (Continued).

6. **QUESTION FOR JURY—COMPUTATION OF AMOUNT OF OVERDRAFT.**—The final amount of the overdraft was the question for the jury to determine, and was to be determined by subtracting all that had been paid into the bank from all that had been drawn out, giving credits on account of interest as the law or the agreement between the parties might indicate. (Id.)
7. **MORTGAGE OF FIRM TO SECURE OVERDRAFT—FORECLOSURE—SEPARATE NOTE AS COLLATERAL—RES ADJUDICATA—CONSTRUCTION OF CODE.**—A mortgage executed to the bank by a member of the firm to secure the amount of the overdraft made by the firm is a distinct obligation from a separate promissory note executed by the members of the firm and the appellant as collateral security for the same overdraft, and does not secure the payment of such note. The foreclosure of the mortgage does not operate as an adjudication to bar a suit on the note, and section 726 of the Code of Civil Procedure is inapplicable to the case. (Id.)
See Corporations, 5, 6.

NEW TRIAL.

1. **ORDER GRANTING NEW TRIAL—DELAY OF HEARING—LACHES—CONSENT—PRESUMPTION UPON APPEAL.**—Upon appeal from an order granting a new trial, where the record does not show that any objection was made to delay in the hearing of the motion on the ground of apparent laches of the moving party, it will be presumed by this court that the time for the hearing of the motion was extended by consent of the parties. (Churchill v. Flournoy, 355.)
2. **STATEMENT—REFERENCE TO MAP TRACING—STIPULATION—PRESUMPTION—CLERK'S CERTIFICATE.**—The fact that the engrossed statement contained a direction as to the insertion of a map tracing, which at the trial had been directed to be filed in lieu of a map used in evidence, and that it was not inserted, and does not appear in the transcript, does not show a skeleton statement inconsistent with an order granting the motion, where it appears that both parties stipulated that the statement was properly engrossed, and that such stipulation was approved by the judge. It must be presumed in support of the order that the map tracing was properly used upon the hearing; and the clerk's certificate that it was not on file cannot be considered, and has no effect against such presumption. (Id.)
3. **PARTIES TO MOTION—SERVICE OF NOTICE—DEATH OF DISCLAIMING DEFENDANT—AUTHORITY OF ATTORNEY—JURISDICTION—AFFIRMANCE OF ORDER.**—The death of a disclaiming defendant, in an action involving the title to water, after a judgment in his favor, and before notice of the hearing of a motion for a new trial, revokes the authority of his attorney; and the service of the notice upon his attorney is ineffectual for any purpose, and cannot confer jurisdiction upon the court to grant the motion as to him. But such disclaiming defendant is not a necessary or adverse party to the motion;

NEW TRIAL (Continued).

and the affirmance of an order granting the motion will not have the effect to vacate the judgment in his favor. (Id.)

4. **OPINIONS OF TRIAL JUDGE AND OF JUDGE GRANTING NEW TRIAL.**—The opinion of the trial judge, whether appearing in the briefs of counsel or in the record, can only be useful to indicate the points involved, and the views of the trial court thereupon, and cannot be considered to affect or change the facts as found; nor can the reason given in the opinion of the judge granting a new trial control the legal effect of a general order granting the same. (Id.)
5. **SUPPORT OF ORDER GRANTING NEW TRIAL.**—An order granting a new trial will be affirmed, if it can be justified on any ground made by statute a ground for new trial, which is included in the motion, regardless of the ground on which the court below may have based its order. (Id.)
6. **CHANGE OF JUDGE—GENERAL ORDER GRANTING NEW TRIAL—CONFLICTING EVIDENCE—PRESUMPTION.**—Where the trial is had before one judge, and the motion for a new trial is passed upon by another judge, the latter stands in the shoes of the former, and has the same power and is charged with the same duty as if the motion had come before the former. If the motion is made upon all the statutory grounds, a general order granting a new trial, made by another judge, is entitled to the same presumption that the court changed its opinion as to the effect of conflicting evidence as if the order were made by the trial judge. (Id.)
7. **ENGROSSMENT OF STATEMENT—REFERENCE TO DOCUMENTS ON FILE.**—A statement in motion for new trial is not defectively engrossed for the purposes of the hearing on the motion, where it makes exact reference to documents on file in the action, as exhibits, with the direction "here insert," without transcribing them at length, though in printing the transcript on appeal the documents referred to must be inserted at length. (Lake Shore Cattle Co. v. Modoc Land etc. Co., 37.)
8. **DISMISSAL OF MOTION—ABUSE OF DISCRETION.**—Where the party moving for a new trial engrossed the statement and presented it to the judge for his signature in due time, and trifling omissions noted by him were at once corrected, but the judge departed from the county, and remained absent for a month, and, after a return of ten days, again left the county, and during his second absence, a motion to dismiss the motion for negligence of the mover was served, upon the hearing of which the properly engrossed statement was presented to the judge for his certification, the dismissal of the motion for negligence was an abuse of discretion. The omission to present the statement during the interval of ten days was not such gross negligence as to warrant the dismissal. (Id.)

See Appeal, 2, 13; Criminal Law, 35; Injunction, 3.

OFFICE AND OFFICERS.

1. **OFFICERS—EMPLOYEES—REMOVAL—CAUSE—PLEASURE OF APPOINTING POWER—CONSTITUTIONAL LAW.**—Though the legislature has power to provide that mere appointees or employees of a public board, who are not officers, may not be removed without just cause, implying the right to notice and an opportunity to be heard before removal, it has no power to make such provision in relation to an officer whose tenure of office is during the pleasure of the authority making the appointment by the terms of section 16 of article XX of the state constitution. (*Patton v. Board of Health of City and County of San Francisco*, 388.)
2. **NATURE OF OFFICE—FIXED COMPENSATION—PUBLIC DUTIES—CONTINUOUS EMPLOYMENT.**—When the legislature creates a position, to which a fixed compensation or salary is attached, and the duties of which pertain to the public, and are to be exercised for the public benefit, and the employment in which is continuous and not merely temporary, transient, or occasional, such position or employment is an office, and he who occupies it is an officer. (*Id.*)
3. **PRESCRIPTION OF OFFICIAL DUTIES BY PUBLIC BOARD.**—The fact that the prescription of the duties of an office is not directly determined by the legislature, and that the legislature has delegated to a public board, directed to make the appointment, the power, as superior officers, to determine the duties of the officer appointed by them, does not render the position any the less an office. (*Id.*)
4. **HEALTH INSPECTOR AN OFFICER—TENURE OF OFFICE—PLEASURE OF BOARD OF HEALTH.**—A health inspector required to be appointed by the board of health of the city and county of San Francisco, and whose duties are to be fixed by the board, under section 3009 of the Political Code, and whose salary is provided for in section 3010 of that code, is an officer within the meaning of section 16 of article XX of the state constitution. His tenure of office, not being otherwise fixed, is subject to the pleasure of the board of health, and is not subject to the statutory requirement of section 3009 against removal otherwise than for cause. (*Id.*)
5. **OFFICERS—NOTICE OF ELECTION—CERTIFICATE—TIME FOR QUALIFICATION—CONSTRUCTION OF CODE.**—The "notice of election" provided for in section 907 of the Political Code is to be given by the issuance of the certificate of election provided for in section 1284 of that code, and the time for the qualification of an elected officer is within ten days after the issuance of his certificate of election, or in default of such certificate, within fifteen days after the commencement of his term of office. (*People ex rel. Barker v. Shaver*, 347.)
6. **ACTUAL KNOWLEDGE—CANVASS OF RETURNS BY ELECTED SUPERVISOR.**—The actual knowledge of the result of the election cannot dispense with or take the place of the issued certificate of election;

OFFICE AND OFFICERS (Continued).

and the fact that an elected supervisor, as chairman of the existing board of supervisors, participated in the canvass of the returns of the election, does not affect the time for his qualification for the elected office. (Id.)

7. **ABORTIVE ATTEMPT AT QUALIFICATION—FORFEITURE—DUE QUALIFICATION—TITLE TO OFFICE.**—An abortive attempt at qualification by an elected supervisor, by way of anticipation of the notice of election required by law, cannot work a forfeiture of his right; and, if no certificate of election is subsequently issued, a due qualification effected by him within fifteen days from the commencement of his term is sufficient to entitle him to the office. (Id.)

8. **INVALID APPOINTMENT BY GOVERNOR.**—There being no vacancy in the office of supervisor, an appointment by the governor to that office is invalid and confers no right. (Id.)

See Elections; Insane Persons; Irrigation District; Phonographic Reporters; Police Pension.

ORDINANCE. See Game.

OVERDRAFT. See Negotiable Instruments, 2-7.

PARTIES. See Estates of Deceased Persons, 15; Mortgage, 37, 39.

PARTNERSHIP.

1. **ACTION AT LAW BY PARTNER—PLEADING—ACCOUNTING AND SETTLEMENT.**—A partner cannot sue his copartners in an action at law, unless an accounting and settlement of the partnership accounts is alleged in the complaint. (Dukes v. Kellogg, 563.)
2. **ACTION FOR AGREED SALARY—INSUFFICIENT COMPLAINT.**—A complaint in an action by a partner against his copartners to recover the amount of an agreed salary, payable out of moneys received by the partnership in the prosecution of its business, which merely alleges an unpaid balance of salary, and that the other copartners collected moneys largely in excess thereof, but which does not allege an accounting and settlement of the partnership, nor sue therefor, does not state a cause of action. (Id.)
3. **TRUSTEESHIP FOR PLAINTIFF—INDEBTEDNESS OF PARTNERSHIP—RIGHTS OF CREDITORS.**—It not appearing in the complaint what was the condition of the indebtedness of the partnership, it cannot be claimed that the copartners were trustees for the plaintiff of a specific fund. Outside creditors of the partnership are entitled, upon an accounting, to be paid in preference to the plaintiff; and an accounting is necessary to settle the claims of the creditors of the partnership, and the rights of the individual partners as between themselves. (Id.)
4. **MINING PARTNERSHIP.**—A mining partnership exists, without an express agreement to form a partnership, when two or more per-

PARTNERSHIP (Continued).

sons owning shares or interests in the mine actually engage in working the same for the purpose of extracting the minerals therefrom. (Ferris v. Baker, 520.)

5. **ACTION FOR DISSOLUTION, ACCOUNTING, AND SALE—EVIDENCE AS TO MINING PARTNERSHIP—NONSUIT.**—In an action for the dissolution of an alleged mining partnership, and for an accounting and sale of the mining property, to repay money contributed by the plaintiff in excess of his proper share in the business of working the mine, where the evidence tends to show the relation of mining partners between the parties, or tends to establish facts indicating that relation which might be reasonably, though not necessarily, inferred from the evidence, it is error to grant a nonsuit. (Id.)
6. **DEED OF MINING INTEREST TO WIFE—WORK BY HUSBAND—AGENCY—RATIFICATION—EXISTENCE OF MINING PARTNERSHIP.**—Evidence showing that the deed of the mining claim in controversy was procured by a husband to be made in the name of the plaintiff and of his wife, made defendant, that the husband and plaintiff worked the mine together, the husband assuming to represent his wife as agent, that subsequently the husband and wife conveyed an undivided interest to another defendant, agreeing that he should "be at no expense for assessment or development work" on the mine, until it should "begin to produce," and that the wife subsequently declared that she owned the mining property individually, and that her husband was her agent in the matter, tends to show a ratification of the deed to her, and of the acts of her husband as her agent, and to show the existence of a mining partnership between the plaintiff and the wife. (Id.)
7. **DECLARATIONS OF HUSBAND AS TO AGENCY.**—The declarations of the husband as to his agency for his wife were incompetent to establish the fact of agency as against the wife, though competent for the purpose of showing that the plaintiff dealt with him as agent, and not as principal. (Id.)

See insolvency, 1; Surety, 10.

PAYMENT. See Corporations, 17-21.

PHONOGRAPHIC REPORTERS.

1. **ORDER FOR PAYMENT OF COMPENSATION—MANDAMUS—PLEADING.**—A petition for *mandamus* against the treasurer to enforce payment of the compensation of a phonographic reporter for services in felony cases, ordered to be paid by the superior court, under section 274 of the Code of Civil Procedure as it stood under the amendment of 1880, must state that the treasurer has funds in his hands applicable to the payment of the demand, else it is insufficient to show that the treasurer is under legal duty to pay the order. (Stevens v. Truman, 155.)

PHONOGRAPHIC REPORTERS (Continued).

2. **ISSUE AS TO WANT OF FUNDS—ADMISSION AT TRIAL AS TO GENERAL FUND—WAIVER OF OBJECTION TO PETITION.**—Where the answer of the treasurer pleaded that there were no funds applicable to the payment of the amount fixed by the order, and both parties treated the sufficiency of the various funds to meet it as in issue, and it was admitted by the treasurer at the trial that there was sufficient money in the general fund to pay the amount, and no objection was made to the findings showing the amounts in the various funds, the judgment should not be reversed for want of an allegation in the petition as to the sufficiency of money in the treasury for that purpose. (Id.)
3. **AUDIT OF CLAIM—PAYMENT FROM GENERAL FUND.**—It is not necessary to the payment of a claim for the services of a phonographic reporter, fixed by the court pursuant to law, that it must have been presented to the auditor; nor is it necessary that the order of the court for its payment should have designated the fund out of which it is to be paid, but the order is to be made upon the treasury and is payable out of the general fund. (Id.)
4. **POWER OF SUPERVISORS TO DESIGNATE SPECIAL FUND.**—The supervisors have no power to defeat the law by designating a special fund for the payment of phonographic reporters, which is insufficient to pay all legal demands upon the treasury therefor, while there is sufficiency of money in the general fund to meet them. (Id.)
5. **CONSTITUTIONAL LAW—VALIDITY OF AMENDMENT OF 1880—JUDICIAL ACTION.**—The amendment of 1880 to section 274 of the Code of Civil Procedure is constitutional and valid. The court, in fixing the compensation of its own reporter thereunder is not fixing the salary of a county officer, but is adjusting compensation for services of a ministerial officer of the court, and in so doing acts not in a legislative, but in a judicial, capacity. (Id.)
6. **UNCONSTITUTIONAL AMENDMENT OF 1885—REPEAL.**—The amendment of 1885 to section 274 of the Code of Civil Procedure authorizing the court to order payment of a monthly salary of an official reporter out of the treasury is unconstitutional and invalid for any purpose, and cannot operate as a repeal of the amendment of 1880. (Id.)

See Criminal Law, 56-59.

PLEADING.

1. **SUPPLEMENTAL COMPLAINT—AID OF ORIGINAL CASE.**—The facts to be alleged in a supplemental complaint must relate to and be material to the original case stated in the complaint. (*Brown v. Valley View Min. Co.*, 630.)
2. **NEW CAUSE OF ACTION—IMMATERIAL ISSUES.**—If a supplemental complaint merely sets forth a new and distinct cause of action, independent of that stated in the original complaint, it is improp-

PLEADING (Continued).

erly filed, and cannot be considered; and it is immaterial whether the issues therein raised are supported by evidence or not. (Id.)

3. **COMPLAINT FOR SERVICES—SUPPLEMENTAL PLEADING OF DIFFERENT CONTRACT—FINDINGS.**—Where an original complaint for services was based upon an express contract for the payment of a specified sum for services performed, and did not allege or show that any contract was made to pay by the month at any rate of wages, a supplemental complaint, setting up a monthly employment under which services were rendered before and after the commencement of the action, sets forth a distinct and independent cause of action; and findings based thereupon are outside of the issues presented by the complaint, and are not in harmony therewith. (Id.)

4. **AMENDMENT OF COMPLAINT—REPEATED OPPORTUNITIES—DISCRETION OF COURT.**—The allowance of amended pleadings is largely in the discretion of the court; and where the plaintiff had been allowed three opportunities to amend his complaint, and had failed to make it sufficient, and a further proposed amended complaint was not tendered by him to the court for its inspection, it is not an abuse of the discretion of the court, nor erroneous, to refuse to permit any further amendment. (Dukes v. Kellogg, 563.)

5. **ADMISSION OF EXECUTION OF NOTE.**—Where a copy of the note sued upon is set out in the complaint, and the answer is not verified, the genuineness and due execution of the note are deemed admitted. (County Bank of Luis Obispo v. Greenberg, 26.)

See Banks; Estates of Deceased Persons, 17; Injunction, 5; Insurance, 11; Malicious Prosecution, 5-7; Mechanic's Lien, 5, 6; Mortgage, 17, 20, 21, 32; Negotiable Instruments, 2; Partnership, 1-3; Phonographic Reporters, 1; Replevin, 3; Statute of Limitations, 2-6; Trusts, 1.

POLICE PENSION.

1. **POLICE PENSION FUND—AMENDED STATUTE NOT RETROACTIVE.**—The act of March 2, 1897 (Stats. 1897, p. 52), including therein the amendment of section 3 of the act of 1889 (Stats. 1889, p. 56), relating to the pension fund payable to retiring police officers, is not retroactive; and the amended section has no application to one whose connection with the police department was at an end before the passage of the amendment. (Clarke v. Police Life etc. Ins. Board, 550.)

2. **MANDAMUS—ALLEGED DISCRIMINATION OF BOARD.**—Upon an application for a mandamus to the police relief, life, and health insurance board to compel the payment of a pension to which the applicant is not entitled, the alleged discrimination of the board in awarding pensions, under the amended act to other retiring police officers no less deserving that applicant is immaterial, and cannot affect the applicant's right. (Id.)

POSSESSION. See Replevin.

PRACTICE.

1. **STIPULATION—MOTION TO BE RELIEVED—DISCRETION OF COURT.**—A motion to be relieved from a stipulation upon the ground that it was entered into through inadvertence, excusable neglect, and mistake of fact, is addressed to the sound discretion of the superior court; and this court will not interfere with the exercise of that discretion in doubtful cases, nor unless it is apparent that the court abused its discretion. (*Moffit v. Jordan*, 628.)
2. **AGREEMENT TO ABIDE EVENT OF ANOTHER SUIT—FORECLOSURE OF STREET ASSESSMENT—DELAY IN APPLICATION—INSUFFICIENT SHOWING.**—It is not an abuse of discretion to refuse to set aside a stipulation agreeing to abide the event of another suit for the foreclosure of a street assessment lien, where the application for relief was not made until after the other case had been decided adversely, and no affidavit of merits was filed at the hearing of the motion, but it was merely shown that since making the stipulation the applicant had discovered that the lot described in the complaint was not the lot described in the assessment, and was not shown that the amount was not due on the assessment, and on the lot therein described, nor that the complaint could not have been amended to obviate the objection. (*Id.*)
3. **NONSUIT—MOTION—ADMISSIONS—INTERPRETATION OF EVIDENCE.**—A motion for a nonsuit admits the truth of all of the plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom; and upon such motion the evidence submitted by the plaintiff is to be interpreted most strongly against the defendant. (*Hanley v. California Bridge etc. Co.*, 232.)
4. **REVIEW ON MOTION FOR NONSUIT.**—On motion for a nonsuit, whatever facts relevant to the issue the evidence for the plaintiff tended to prove must be regarded as proved, and the plaintiff is entitled to the benefit of the facts in testimony, and of the presumptions of fact which might reasonably be drawn from them. (*Ferris v. Baker*, 520.)
See Appeal; Attachment; Bill of Exceptions; Evidence; Execution; Findings; Instructions; Interpleader; Judgment; New Trial; Pleading; Summons.

PROMISSORY NOTES. See Negotiable Instruments.

PUBLIC OFFICERS. See Officer and Officers.

QUIETING TITLE. See Taxation.

RAILROAD. See Mechanic's Lien, 1-6; Negligence, 11-13.

RECEIVER.

1. BUILDING AND LOAN ASSOCIATIONS—ACT RELATING TO STATE COMMISSIONERS—INJUNCTION SUIT—POWER TO APPOINT RECEIVER—PRINCIPLES OF EQUITY—DISCRETION.—The act of 1893 creating the commissioners of building and loan associations of the state of California, and authorizing the attorney general, upon complaint by the commissioners of the unsafe condition of a building and loan association, to sue for an injunction to restrain it from further conducting its business, and giving the court power in such suit to “appoint one or more receivers to take possession of its property and effects,” does not authorize the court to appoint a receiver therein regardless of the general principles of equity, but only in the discretion of the court in a proper case for such appointment. (*People ex rel. Commissioners of Building etc. Assn. v. Union Building etc. Assn.*, 400.)
2. UNAUTHORIZED APPOINTMENT OF RECEIVER—RIGHTS OF DIRECTORS—STATE NOT INTERESTED—INSUFFICIENT SHOWING.—The rights of the directors of the building and loan association to wind up its affairs cannot be interfered with by the appointment of a receiver at the suit of the state, which is neither a creditor nor stockholder of the corporation, and has no pecuniary interest therein, where no facts are alleged and found as to fraud, mismanagement, or incompetency of the directors, such as would justify the appointment of a receiver if the application had been made by a creditor or stockholder of the corporation. (*Id.*)
3. APPEAL—RECEIVER NOT A PARTY—SERVICE OF NOTICE—PETITION FOR REHEARING—ARGUMENT.—A receiver is appointed in a cause litigated between other parties, and can have no interest in the litigation, and cannot be an aggrieved party to the judgment. He has no right of appeal therefrom, and cannot have any standing in this court by the service upon him of a notice of appeal from the judgment, under which he was appointed as receiver. He cannot be authorized by such service to file a petition for rehearing, or to file a brief otherwise than as *amicus curiae*. (*Id.*)
4. REVIEW UPON APPEAL FROM JUDGMENT—INTERVENTION NOT DISPOSED OF—ABSENCE OF BILL OF EXCEPTIONS—PRESUMPTION.—A complaint in intervention which was not finally disposed of, but remains pending upon demurrers thereto and a motion to strike out, cannot, in the absence of a bill of exceptions, be considered upon appeal from the final judgment rendered in the cause; but it must be presumed that the intervenor did not apply for a postponement of the trial until issues could be formed upon his complaint, but that action thereupon was waived, so far as the trial of the other issues between the original parties was concerned. (*Id.*)
5. REVIEW OF ORDER APPOINTING RECEIVER—PLEADINGS AND FINDINGS—ABSENCE OF EVIDENCE—PRESUMPTION.—Upon appeal from the judgment, where facts warranting the appointment of a receiver are

RECEIVER (Continued).

neither averred in the pleadings nor shown in the findings, it cannot be presumed, in the absence of the evidence that the court received evidence outside of the issues which may have justified the order; but the order making the appointment is properly reversed upon the judgment-roll. (Id.)

See Corporations, 21.

RECORDING. See Mechanic's Lien, 3; Mortgage, 25, 36.

REDEMPTION. See Mistake; Mortgage, 31.

REPLEVIN.

1. **REPLEVIN—CHattel Mortgage—Stipulation for Possession.**—A stipulation in a chattel mortgage expressly giving the mortgagee a right of possession upon default of the mortgagor in the payment of the note or the interest is valid; and the mortgagor or his assignee, upon such default, is entitled to maintain replevin for the mortgaged property. (Flinn v. Ferry, 648.)
2. **Maturity of Note and Mortgage before Trial—Return of Replevined Property not Required—Costs.**—Where the note and the mortgage containing such stipulation for right of possession became mature before the trial, even if the defendant was entitled to the possession of the replevied property at the commencement of the action, the court should not decree the return thereof to the defendant at the trial, merely that it might again be replevied by the plaintiff, but should leave the possession of the property where it belongs, and give the defendant judgment for costs only. (Id.)
3. **Pleading—Aider of Complaint by Answer.**—Where the complaint alleged that plaintiff was in possession of the property and entitled thereto on the day before the commencement of the action, and that defendant then wrongfully took possession of the property, and refused to return it upon demand, any defect therein is aided and cured by the answer taking issue upon plaintiff's right of possession on the day named, or at any other time, and affirmatively averring that defendant is and at all of the times herein mentioned was the owner and entitled to the immediate possession of the property, which affirmative averments must be deemed denied. (Id.)
4. **Trial of Issues—Objection upon Appeal.**—The defendant having gone to trial upon the theory that the title, or right of possession of the property, was in issue, cannot, upon appeal, for the first time be heard to say that here was no such issue. (Id.)
5. **Taking Possession of Property—Immaterial Matters.**—The facts that, prior to the commencement of the action, plaintiff had gone to defendant's lodging-house and taken possession of the property, and that the property was retaken by the defendant upon an order made by the police court, are immaterial matters having nothing to

REPLEVIN (Continued).

do with the right of possession of the property. (Id.)

6. **EVIDENCE—IMPROPER EXAMINATION BY COURT.**—Where the defendant had testified nothing about what occurred prior to the commencement of the action as to taking possession of the property, either upon direct or cross-examination, it was prejudicial error for the court, against the objection of the plaintiff, to question the defendant as to immaterial details of what occurred when plaintiff took possession of the property, which details could only tend improperly to arouse the passion and prejudice of the jury against the plaintiff. (Id.)

See Estoppel, 1.

ROBBERY. See Criminal Law, 45-51.

SALE. See Estoppel, 5, 6; Statute of Frauds.

SAN FRANCISCO. See Jury and Jurors.

SCHOOLS.

1. **SCHOOL DISTRICT—DIVISION BY ENLARGED CITY BOUNDARIES—ANNEXATION FOR SCHOOL PURPOSES—CONSTRUCTION OF CODE.**—Section 1576 of the Political Code, providing for the annexation by the supervisors for school purposes of the remainder of a school district divided by the organization of an incorporated city or town, upon petition of the majority of the heads of families residing therein, is to be liberally construed, as permitting such annexation where the district is divided by the reincorporation of a city or town with enlarged boundaries. (Kramm v. Bogue, 122.)
2. **RIGHTS OF PUPILS IN ANNEXED SCHOOL DISTRICT—REGISTRATION.**—Pupils resident in the remainder of the school district, which has been annexed by the supervisors to a city for school purposes, are entitled to attend the public schools of the city, though not residents of the city, in the order of their registration, which must be made by the board of education. (Id.)
3. **EQUITABLE GROUND FOR ANNEXATION—CONVEYANCE OF SCHOOL PROPERTY TO CITY.**—The conveyance to the city of school property of great value in the remainder of the divided school district, including the schoolhouse situated therein, in consideration that all the residents of the district shall have the rights and privileges of the public schools of the city, even if such contract was not valid, affords a strong equitable ground for the exercise by the supervisors of their power to annex the remainder of the district to the city for school purposes. (Id.)
4. **RESULT OF ANNEXATION—APPLICATION OF PUPIL—CONSENT OF TRUSTEES.**—The result of the annexation to the city of the remainder of the school district for school purposes is to destroy it as a sep-

SCHOOLS (Continued).

arate school district, and there being no trustees thereof, their consent is not required to an application of a pupil to attend the public schools of the city. (Id.)

5. **AMBIGUITY OF COMPLAINT—RESIDENCE OF PUPIL—GENERAL DEMURRER.**—A complaint by a parent to establish the right of his son to attend the public schools of the city, which avers, that when the demand was made he was a resident of a city school district, and which also avers that he was and is residing in the former school district by its name, which it is further alleged became and is a part of the city school district by the alleged action of the board of supervisors in annexing it for school purposes, is not misleading, nor subject to a general demurrer. (Id.)

See Contract, 1-3.

STATUTE OF FRAUDS.

1. **SALE OF PERSONAL PROPERTY—MEMORANDUM—TELEGRAMS—FIGURES AND ABBREVIATIONS—INTERPRETATION.**—Upon a sale of personal property within the statute of frauds, where the memorandum of agreement consisted of telegrams bearing the same date, and containing symbolic figures and abbreviated terms, they should not only be read together, for the purpose of determining their sufficiency, but the court is permitted to interpret the terms used therein by the light of all the circumstances under which they were sent and received, and in the light of all the knowledge of the meaning of the terms which the parties to the transaction had at the time, and, if it can thus be plainly seen from the proper understanding of the telegrams who were the parties to the contract, and what were its subject matter and terms, the memorandum should be held sufficient. (*Brewer v. Horst & Lachmund Co.*, 643.)

2. **ADMISSIBILITY OF PAROL EVIDENCE.**—Parol evidence is admissible in such case to explain all of the circumstances surrounding the parties, to show in what sense the figures and abbreviated terms were used and understood by the parties, and to connect the description of the subject matter with the thing intended. (Id.)

STATUTE OF LIMITATIONS.

2. **CONSTRUCTION OF STATUTES OF LIMITATION.**—Statutes of limitation are intended to prevent stale demands from springing up after long periods of time, and not as defenses to just demands of recent origin. They uphold defenses which are clearly within them, however unjust and unconscionable they may be; but, where the facts relied upon leave it greatly in doubt whether or not the case is within the statute pleaded, the court will not indulge in a strained construction in order to support it. (*California Sav. etc. Soc. v. Culver*, 107.)

STATUTE OF LIMITATIONS (Continued).

2. **ACTION UPON NEW ACKNOWLEDGMENT OF PROMISE—BAR OF STATUTE—CONDITIONAL PROMISE.**—Action must be brought not upon the original obligation, but upon the new acknowledgment or promise, if made after the original obligation is barred by the statute of limitations, and also upon a conditional promise made before such bar has attached, if the action is brought thereafter. (*Rodgers v. Byers*, 528.)
3. **COMPLAINT UPON CONDITIONAL PROMISE.**—Where a conditional promise is relied upon, it must be pleaded as made, and the breach of the condition must be averred and proved, and the recovery had after such showing. (*Id.*)
4. **ACTION UPON NOTE—PLEADING—CONTINUING CONTRACT—ABSOLUTE PROMISE.**—A complaint in an action upon a note which alleges absolute written promises made by the defendant before the bar of the statute attached upon the note to pay the amount thereof, and which shows upon its face that the note would otherwise be barred, avers a continuing contract, and the action appears to be properly brought upon the original obligation. (*Id.*)
5. **VARIANCE—PROMISE TO PAY WHEN ABLE.**—The action upon the note as a continuing contract cannot be sustained by proof of letters containing a conditional promise to pay the note when able. In such case, the variance is fatal; and the action could only have proceeded upon the promise as made, with an averment in the complaint of condition broken, after defendant's ability to perform. (*Id.*)
6. **ACTION FOR SERVICES—PLEADING.**—In an action for the value of services rendered, where the complaint does not show upon its face that the cause of action is barred by the statute of limitations, the plea of the statute cannot be raised by demurrer, but is properly presented by answer. (*Etchas v. Orena*, 588.)
7. **AGREEMENT NOT TO PLEAD THE STATUTE—EXECUTION BY BANK—AUTHORITY OF PRESIDENT—SUPPORT OF FINDING.**—Where an agreement not to plead the statute of limitations was executed in the name of a bank by its president, evidence that the president was the general manager of the bank, having general power under its by-laws to manage its affairs, and to perform all duties which its interests may require, when not limited by its by-laws, or by express instructions from the board of directors, and that the president and vice-president thought the execution of the agreement was for the best interest of the bank, is sufficient to support a finding that the bank executed the agreement. The fact that the president signed it as such and not also as manager, is immaterial. (*Wells, Fargo & Co. v. Enright*, 669.)
8. **CONSIDERATION OF AGREEMENT—FORBEARANCE TO SUE.**—Where the agreement not to plead the statute of limitations expressed on its face that the promise was made in consideration of a promise by the creditor to refrain from instituting suit for the period

STATUTE OF LIMITATIONS (Continued).

of six months, before the expiration of which the bar of the statute would otherwise attach, though it had not attached at the date of the agreement, and the plaintiff forbore to sue for that period of time, such forbearance and suspension of the plaintiff's right to sue is a valuable consideration for the agreement. (Id.)

9. **VALIDITY OF AGREEMENT—WAIVER OF PERSONAL PRIVILEGE—ESTOPPEL—PUBLIC POLICY.**—An agreement not to plead the statute of limitations is a mere agreement to forego a personal privilege secured to the debtor by statute, which the debtor may waive, and such agreement may operate to estop him from a defense of the statute. Such agreement is not opposed to any public policy, but is, on the contrary, a valid agreement which sound morals require should be enforced. (Id.)
10. **REASONABLE LIMITATION.**—It seems to be a reasonable limitation to allow an action to be brought after such an agreement at any time within the period of statutory limitation dating from the agreement. (Id.)

See Banks, 1; Corporations, 5, 6-8; Estates of Deceased Persons, 30-32, 40; Mortgage, 7; Taxation.

STIPULATION. See Practice, 1.

STOCK AND STOCKHOLDERS. See Corporations.

STREET ASSESSMENT.

1. **STREET IMPROVEMENT—JURISDICTION OF CITY COUNCIL—PROTEST OF OWNERS OF FRONTAGE—ASSESSMENT—FINDING—REVIEW UPON APPEAL.**—Upon appeal from a judgment enforcing an assessment for a street improvement, where the jurisdiction of the city council to order the improvement is assailed, upon the ground that the owners of a majority of the frontage had protested against it, if the record is silent as to the amount of the entire frontage, the finding of the superior court against the sufficiency of such protest cannot be disturbed; and it is immaterial to consider whether erasures upon the protest were properly made. (Pacific Paving Co. v. Mowbray, 1.)
2. **ERROR NOT TO BE PRESUMED—DUTY OF APPELLANT.**—Error is not to be presumed, but must in all cases be made to appear affirmatively before the appellant is entitled to a reversal; and, if the appellant seeks to have a finding set aside, it is incumbent upon him to show upon the record that it was contrary to the evidence. (Id.)
3. **REGULARITY OF ASSESSMENT—PRIMA FACIE EVIDENCE—INSUFFICIENT PROTEST.**—The assessment and other documents connected therewith are made by the statute *prima facie* evidence of its regularity and correctness, and of the prior proceedings and acts of the city council, and such *prima facie* evidence is not overcome

STREET ASSESSMENT (Continued).

- by evidence of a protest not proved to have been signed by the owners of a majority of the frontage. (Id.)
4. **PROTEST NOT PURPORTING TO BE PROPERLY SIGNED—ACTION OF COUNCIL UNNECESSARY.**—Where the protest did not “purport” to be signed by the owners of a majority of the frontage, it was not necessary that the city council should determine or enter of record its judgment that it had not been so legally signed. (Id.)
 5. **“REMONSTRANCE”—“APPEAL.”**—The distinction between a “remonstrance” and an “appeal” under the street improvement law is, that the former is made, before assessment, to the action or proceedings of the council, while the latter is made after the assessment, and relates to the acts of the superintendent of streets which are specified as grounds for appeal. (*Girvin v. Simon*, 491.)
 6. **FORM OF “APPEAL”—USE OF WORD “REMONSTRATE.”**—A written objection addressed to the city council by the owner of property assessed, and filed with the clerk after the assessment, though not designated as an “appeal,” and purporting to “respectfully remonstrate against the acceptance of the contract” described therein, upon the “claim” that “said contract has not been done according to specifications on file in the office of the street superintendent,” and stating what work the “claim” includes, is an effective appeal in form and in substance. (Id.)
 7. **EFFECT OF APPEAL—STAY OF PROCEEDINGS—DUTY OF COUNCIL AS TO NOTICE OF HEARING.**—An appeal taken by one assessed owner of property, going to the whole of the work done under the contract, operates to stay proceedings against all assessed owners until the appeal is regularly determined after published notice of hearing, which it is the imperative duty of the council to give, and not of the appellant to ask for. (Id.)
 8. **POWER OF COUNCIL—RIGHTS OF PROPERTY OWNERS.**—The council has no power to dismiss an appeal, or to bind the appellant or other assessed owners of property by deciding without notice or hearing that the appeal is insufficient. The appeal is to be deemed pending, notwithstanding such action; and all assessed owners have a right to be heard thereupon, and can only be concluded by determination thereof after due notice of hearing. The appellant and all other parties assessed may safely rest until due notice is given. (Id.)
 9. **PREMATURE FORECLOSURE.**—An action to foreclose any street assessment pending an appeal by any other property owner assessed upon different property involving the validity of the assessment, and which, if determined in favor of the appellant, would preclude a recovery against any of the parties assessed, is premature, and cannot be sustained. (Id.)
 10. **NEW ASSESSMENT—PLEADING—RESOLUTION OF BOARD UPON APPEAL—DUE PASSAGE.**—A complaint upon a new street assessment which

STREET ASSESSMENT (Continued).

alleges that, upon appeal from the original assessment, the board of supervisors "duly made and passed" a resolution setting the assessment aside, and directing the superintendent to issue a new assessment, warrant, and diagram, sufficiently states in legal effect, under section 456 of the Code of Civil Procedure, that everything necessary to be done to give the resolution validity has been done. (*Williams v. Bergin*, 578.)

11. **AVERMENT AS TO RETURNS—REFERENCE TO PREVIOUS AVERMENTS OF DEMAND.**—Where the demand alleged is fully set forth in the complaint, and accords with the provisions of the statute, an averment that the return stated the nature and character of the demand "as set forth aforesaid" sufficiently alleges a return complying with the requirements of the statute as to such statement. (*Id.*)
12. **ASSESSMENT TO UNKNOWN OWNERS—PART PAYMENT BY OWNERS OF HALF OF LOT—STATEMENT IN RETURN—LIEN NOT RELEASED.**—Where one-half of the assessment of a lot to unknown owners was paid by the owners of half of the lot between the making of the demand and the return, it is proper so to state in the return; but the lien against the lot is an entirety for the whole and every part of the assessment, and such part payment cannot have the effect to release any part of the lot assessed from the lien for the amount remaining unpaid. (*Id.*)
13. **NOTICE OF AWARD—"CONSPICUOUS" POSTING—FORM OF AVERMENT—DEMURRER.**—The objection that the complaint does not allege that the notice of award was posted "conspicuously" by the clerk goes to the form of the allegation, rather than its substance, and can only be reached by special demurrer. The allegation that such notice was posted by the clerk is sufficient as against a general demurrer. (*Id.*)
14. **TIME OF COMMENCEMENT OF WORK.**—It is not necessary that the superintendent of streets should fix in the contract the "day" upon which the work should commence; but it is sufficient that the time be fixed as within a specified number of days from the date of the contract. (*Id.*)
15. **DEMAND AND RETURN BY AGENT—SUFFICIENCY OF AVERMENTS.**—Averments in the complaint that a certain person, as agent of the plaintiffs, on a specified day, with and by virtue of the warrant, assessment, and diagram entered upon the lot and publicly demanded thereon payment of the amount of the assessment, and returned the warrant to the superintendent, with a statement of the nature and character of the demand indorsed thereupon signed and verified by him, sufficiently state a demand and return made by such person at the instance of the plaintiffs. It is not necessary to set forth the terms of the agency, or to allege specifically that the plaintiffs had authorized such person to make the demand. (*Id.*)

STREET ASSESSMENT (Continued).

16. **RECORD OF ENGINEER'S CERTIFICATE—CLERICAL DEFECT.**—In an action to foreclose the lien of a street assessment, a clerical defect in the record of the certificate of the engineer, owing to the omission of the words, "depth being O. K.," where the exact depth is stated in the recorded certificate, and the remainder of the certificate, together with the assessment, diagram and warrant, were correctly recorded, does not affect any substantial right of the owner of the lot, but shows a substantial compliance with the statute. (*Moffit v. Jordan*, 622.)
17. **SHOWING OF RECORD PRIOR TO DEMAND—PRESUMPTION.**—Where it is plain from the record that the plaintiff had the assessment, warrant, and diagram in his possession after they were recorded, and when the demand was made nearly thirty days subsequent to the record, it cannot be presumed that they may have been delivered to the plaintiff before they were recorded. (*Id.*)
18. **BLANK DATE IN RECORD OF RETURN—IMMATERIAL OMISSION.**—Where the original return of demand, and the verification thereof were properly made and dated, a clerical omission to fill a blank date left in the record of the verification is immaterial, and could have injured no one, and cannot operate to deprive the contractor of his lien. (*Id.*)
19. **PUBLICATION OF NOTICES AND RESOLUTIONS—COLLATERAL ATTACK.**—When the notices and resolutions concerning the assessment were published in a newspaper designated by the board of supervisors, the defendant cannot, in an action to foreclose the assessment, collaterally attack the publication by proof that such newspaper was not the lowest bidder, and that the publishing was not let to the lowest bidder. (*Id.*)
20. **STREET IMPROVEMENT—PROTEST OF OWNERS OF MAJORITY OF FRONTAGE—JURISDICTION OF SUPERVISORS—CASE AFFIRMED.**—The protest of the owners of the majority of frontage upon a proposed street improvement, delivered to the clerk of the board of supervisors of the city and county of San Francisco, within proper time, not only operates to suspend the jurisdiction of the board to proceed with the improvement for the period of six months, but also precludes the further ordering of the work to be done without the passage of a new resolution of intention therefor; and no lien can be created by an assessment for the work without such new resolution. (*Union Paving etc. Co. v. McGovern*, 638.)
21. **AGREEMENT OF PROPERTY OWNERS—ASSIGNMENT OF CONTRACTS—PROPORTIONAL ASSESSMENT UNDER ORIGINAL CONTRACT—ESTOPPEL.**—The agreement by certain property owners to obtain a contract for the proposed work in front of their lots at a reduced rate, and to assign the same to one who agreed to do the work for them at that rate, to be paid "on completion of said work," without any agreement by them to pay any assessment under the original contract,

STREET ASSESSMENT (Continued).

and without any representation by them as to its validity, does not estop them from disputing the validity of a proportional assessment in favor of an assignee of the original contract, who was also an assignee of the contract of the owners, for work done under the original contract, in the completion of two blocks out of six included therein. (Id.)

22. FORECLOSURE OF STREET ASSESSMENT—STATUTORY PROCEEDINGS—ESTOPPEL IN PAIS INAPPLICABLE.—In an action to foreclose a street assessment, the lien of which exists only by virtue of a strict compliance with the provisions of the statute, and the proceedings in which are purely statutory, and without the enforcement of any personal liability, the doctrine of estoppel *in pais* has no application. (Id.)

See Injunction, 4, 5; Municipal Corporations, 3, 4; Practice, 2.

SUMMONS.

1. PRACTICE—DEFAULT—SERVICE OF SUMMONS—RETURN.—After a service of summons has been set aside and vacated, and so long as the order therefor remains in force, the county clerk has no authority, and cannot be compelled by *mandamus* to enter the default of the defendant for failure to answer upon the return of such vacated service. (Elder v. Grunsky, 67.)
2. FOREIGN AND DOMESTIC CORPORATIONS—INSUFFICIENT RETURN.—Where an action is brought against a corporation, alleged in the complaint to be organized under the laws of the state of California, and the return of the service of summons, which recites that the defendant is a foreign corporation, is insufficient to show a valid service upon a domestic corporation, the county clerk is justified in refusing to enter the default of the defendant for failure to answer. (Id.)
3. SERVICE—PROOF—JURISDICTION—JUDGMENT BY DEFAULT.—The service in fact of the summons, rather than the proof of service, gives the court jurisdiction of the person of the defendant. If the summons was served, and the return of service purports upon its face to have been made by proper authority, even though not in fact so made, the court has jurisdiction to hear and determine the cause, and may render a valid judgment therein by default. (Bank of Orland v. Dodson, 208.)
4. UNAUTHORIZED RETURN OF SERVICE—FORECLOSURE OF MORTGAGE—VALID DECREE AND SALE.—The fact that the name of the sheriff was signed to the return of service of the summons in an action to foreclose a mortgage, by one assuming to act as deputy who was not an authorized deputy, cannot affect the jurisdiction of the court, by virtue of the service actually made, to render a valid decree of foreclosure, or affect the validity of the sale made under the decree. (Id.)
5. ALIAS SUMMONS—VOID PROCEEDINGS—DISMISSAL.—After the plaintiff has obtained title under a valid foreclosure of a mortgage and

SUMMONS (Continued).

the judgment has been fully satisfied and the deficiency judgment paid, and the time for appeal therefrom has expired, there is no authority for the issuance and service of an alias summons in the cause, and the court has no jurisdiction to proceed with the trial thereof. All the proceedings had under such alias summons are void, and any judgment rendered thereunder will be reversed upon appeal, and the proceedings dismissed. (Id.)

SUPERVISORS. See Counties; Election, 1.

SURETY.

1. **BOND OF GUARDIAN—JUDGMENT AGAINST SURETIES—ASSIGNMENT TO PAYING SURETIES—CONSTITUTION—ELECTION OF PROCEDURE.**—Part of the sureties upon a guardian's bond, who have paid in full a judgment rendered against the guardian and all of the sureties, to the extent of the liability of each upon the bond, may enforce contribution from the remainder of the sureties, and may, if they choose, proceed against them in the manner provided in section 709 of the Code of Civil Procedure; but they are not compelled to do so, and may, instead, taken a written assignment of the judgment from the plaintiff upon payment thereof, and enforce it in his name by execution against each of the other sureties for his proportionate share of the debt, independently of section 709, which is not intended to include the case of such an assignment. (Williams v. Riehl, 365.)
2. **ASSIGNMENT TO JUDGMENT DEBTORS.**—The fact that the sureties making the payment to the plaintiff were some of the judgment debtors could not prevent them from taking an assignment of it, for the purpose of enforcing contribution from the other judgment debtors. (Id.)
3. **PAYMENT BY PART OF SURETIES—JUDGMENT NOT SATISFIED—INTENTION OF PARTIES.**—The payment of a judgment by one or more joint debtors does not operate as an accord and satisfaction of the judgment as to other joint judgment debtors, unless it plainly appears that the payment was intended to have such effect; and the payment of a judgment against sureties on a bond by part of them, who, upon such payment, take an assignment of the judgment for the enforcement of contribution against other cosureties, or the principal debtor, cannot operate as a satisfaction of the judgment as against them, nor render the assignment invalid. (Id.)
4. **INDEMNITY FROM PRINCIPAL TO PAYING SURETIES—CONTRIBUTION—EQUALITY OF BURDEN AND BENEFIT.**—Property transferred by the principal debtor to the paying sureties by way of indemnity need not be first exhausted by them before proceeding to enforce contribution against each of the other sureties, for his proportionate share of the debt. In such case, equality of burden and of benefit

SURETY (Continued).

is equity; and the indemnity, whenever enforced, will inure to the benefit of all of the sureties. (Id.)

5. **ENFORCEMENT OF JUDGMENT BY ASSIGNEES—EXECUTION LIMITED TO PROPORTIONATE SHARE OF SURETY.**—The judgment can only be enforced by the assignees against any other surety for an aliquot part of the debt, based on the whole number of sureties, and on the legal liability of all the sureties to contribute in the proportion of the respective amounts for which they became surety; and execution cannot be allowed against any surety for an amount in excess of his legal proportion of the debt. (Id.)
6. **PRESUMPTION OF SOLVENCY OF SURETIES—ACTION IN EQUITY.**—The proceeding for the enforcement of the judgment is not in equity, and must be governed by the legal presumption that all of the sureties are solvent. If some of them are in fact insolvent, the sureties may bring their action in equity for contribution, in which the burden may be equally placed upon the solvent sureties. (Id.)
7. **PRINCIPAL AND SURETY—RIGHTS OF SURETIES UPON BOND.**—Sureties upon a bond to secure the performance of a contract by the principal are entitled to stand upon the precise terms of the bond, and are not bound beyond its strict letter. (*Cadenasso v. Antonelle*, 382.)
8. **BOND FOR CONSTRUCTION OF MINING TUNNEL—AGREEMENT TO PAY FOR LABOR AND MATERIAL—MONEY ADVANCED TO CONTRACTORS—INTEREST IN PROFITS.**—A bond to secure the performance of a contract for the construction of a mining tunnel, containing an agreement to pay in full all persons performing labor or furnishing materials for the contractors, or any person acting for them or under their authority, in connection with the contract, does not bind the sureties to repay to third parties moneys advanced by them to the contractors, under an agreement for a share in the profits secured by an assignment of the contract. (Id.)
9. **ACTION UPON BOND—PLEADING—FINDING—INSUFFICIENCY OF EVIDENCE.**—In an action upon such bond, a complaint averring that labor and materials of the value of a specified sum were advanced by the plaintiffs to one of the contractors named in the bond, and a finding to the same effect, against the sureties upon the bond, are not supported by evidence showing that moneys to the amount specified in the complaint were advanced by the plaintiffs to such contractor; nor can evidence that a small portion of the amount advanced was due for materials furnished, sustain the finding. (Id.)
10. **ASSIGNMENT OF CONTRACT, WITH AGREEMENT TO DIVIDE PROFITS—PARTNERSHIP.**—The assignment of the contract to construct the tunnel to the plaintiffs, who advanced money under an agreement to divide the profits arising from the contract, for the use of the

SURETY (Continued).

money advanced, does not constitute a partnership between the plaintiffs and the contractor making the assignment. (Id.)

See Appeal, 10-12, 16-20; Assignment; Corporations, 7, 8; Justice's Court, 6, 7.

TAXATION.

1. **QUIETING TITLE TO CITY LOTS—DEFENSE OF CITY—CLAIM OF TAXES—STATUTE OF LIMITATIONS.**—In an action to quiet title to city lots, a defense of the city setting up a claim for taxes assessed and levied more than three years prior to the commencement of the action, and demanding their payment as a condition of plaintiff's recovery is barred by the statute of limitations. (*Dranga v. Rowe*, 506.)

2. **INVALID ASSESSMENT AND LEVY OF TAXES—REINCORPORATION OF CITY.**—To be valid, the assessment and levy of taxes must be made strictly as provided by law. In a city reincorporated under a lower class, the assessment, equalization, and levy of taxes must be made as provided for cities of such lower class, and, if made for the year of reincorporation, as differently provided for cities of the class under which the city was originally incorporated, they are invalid and void. (Id.)

3. **ACTION TO DETERMINE ADVERSE CLAIM—VOID CLAIM OF DEFENDANT—CONSTRUCTION OF CODE—INAPPLICABLE RULES OF EQUITY.**—The rule that equity will require a plaintiff to do equity, by paying such taxes as ought equitably to be paid, as a condition of enjoining a tax sale, and that equity will not cancel a void tax deed, which cannot amount to a cloud upon title, are inapplicable to an action under section 738 of the Code of Civil Procedure to determine an adverse claim, in which action plaintiff is entitled to judgment, if there is a disclaimer, or if the answer shows no legal defense, and the objection that the adverse claim of the defendant is void upon its face is not available. (Id.)

TELEGRAPH. See Criminal Law, 54; Malicious Prosecution, 3.

TELEPHONE. See Criminal Law, 54.

TENANTS IN COMMON. See Trusts, 5-7.

TORTS.

1. **TORTS FEASORS JOINTLY AND SEVERALLY LIABLE—SEVERAL JUDGMENTS—SATISFACTION.**—The liability of tort feasors for the same tort is joint and several. They may be sued jointly in one action, or severally in different actions, and several judgments may be rendered either in several actions or in a joint action. No bar arises by the mere rendition of several judgments, or until satisfaction in some form is received, or what in law is deemed an equivalent. (*Grundel v. Union Iron Works*, 438.)

TRUSTS (Continued).

- 2. ACTION FOR DEATH—INJURY UPON GANG PLANK OF VESSEL—LIMITED LIABILITY OF OWNERS—FEDERAL PROCEDURE—SEVERANCE OF ACTION—IMPROPER DISMISSAL.**—In an action for death caused from an injury received by reason of an insecure gang plank extending between a schooner and a wharf, by the wrongful act of several defendants, including the owners of the vessel, the fact that such owners availed themselves in the United States district court of the limited liability fixed by the federal statutes, and that the plaintiff appeared therein to claim damages to the extent of the appraised value of the vessel, does not preclude his right to proceed in the superior court against the other defendants, while the proceeding was pending in the federal court; and it was error for the superior court to dismiss the action as to the other defendants, because of such federal proceeding, the plaintiff not having received satisfaction, or the equivalent thereof, in any amount. (Id.)

TREATY. See Aliens.

TRUSTS.

- 1. RESULTING TRUST—PART PAYMENT OF PURCHASE MONEY—PURCHASE OF TITLE UNDER EXECUTION—NOTICE OF EQUITY.**—A payment of part of the purchase money of land, the legal title to which is held by another, carries with it by resulting trust a proportionate equitable estate in the land purchased, which may be enforced in equity against a subsequent purchaser of the legal title under execution, who took with notice of the equity. (South San Bernardino Land etc. Co. v. San Bernardino Nat. Bank, 245.)
- 2. PLEADING—GENERAL DEMURRER—UNCERTAINTY.**—A complaint to enforce a resulting trust which states facts showing a sale, and the proportion of the price paid by each purchaser, and bringing the case clearly within the rule requiring the enforcement of an equity against the defendant, is good as against a general demurrer, and any uncertainty as to the time of payment of the purchase price cannot be objected to if not urged as a ground of special demurrer. (Id.)
- 3. REVIEW UPON APPEAL—OBJECTION TO COMPLAINT BY RESPONDENT.**—Upon appeal by the plaintiff, an objection by the respondent to the complaint cannot be heard, unless it is so defective in averment that it would not support any judgment in plaintiff's favor. (Id.)
- 4. FORMER JUDGMENT—RES ADJUDICATA—IMPROPER ACTION TO QUIET TITLE.**—A former judgment between the parties is only conclusive when the same thing under the same title is litigated. A former judgment against the plaintiff in an action which he was not entitled to maintain as a *cestui que trust* to quiet his title, against the defendant who was his trustee of the legal title, cannot estop him

TRUSTS (Continued).

- from maintaining a subsequent action which he is entitled to maintain to enforce a resulting trust in his favor against the same defendant. (Id.)

5. **MINING CLAIM—TENANCY IN COMMON—AGREEMENT TO OBTAIN PATENT—CONTRIBUTION TO EXPENSES.**—One who bought from a former claimant and paid for one-fourth interest in a mining claim, without taking a deed thereof, and went into possession thereof, and was for many years recognized as a tenant in common by the claimant of the other three-fourths, and who entered into an agreement with such other claimant that they should jointly procure a patent for the mining claim, and contributed toward the survey and expenses of obtaining a patent, may enforce a trust in a certificate of purchase of the whole mining claim obtained in the name of the other claimant, to the extent of his one-fourth interest in the claim. (*Costa v. Silva*, 351.)

6. **PAROL EVIDENCE—REQUEST FOR JOINT EXPENDITURES—PAYMENT OF CONSIDERATION—RESULTING TRUST.**—Parol evidence that, prior to the filing of defendant's application for a patent, defendant asked plaintiff to contribute toward his one-fourth interest, that plaintiff then contributed a certain sum toward the survey, that he had before that bought and paid for his one-fourth interest, which was worked in common with the defendant, and the proceeds divided proportionately, is admissible to show that the title was to be obtained for their common benefit, and to establish a resulting trust in the certificate of purchase to defendant by payment of part of the consideration therefor, and is not objectionable, on the ground of an attempt to prove a contract concerning real estate by parol. (Id.)

7. **OPINION EVIDENCE—RECOGNITION OF PLAINTIFF'S INTEREST—STATEMENT OF FACTS—HARMLESS RULING.**—The fact that part of the testimony tending to show a recognition by the defendant of plaintiff's one-fourth interest was a mere opinion of the plaintiff as a witness, objection to which was overruled, is not sufficient ground for reversal, where the facts showing such recognition were stated fully by the witness, and were not controverted by the defendant. (Id.)

See *Equity*; *Mortgage*, 4, 5; *Wills*, 4-6.

WATER AND WATER RIGHTS.

WATER RIGHTS—APPEAL FROM JUDGMENT—SUBORDINATE RIGHTS—APPELLANTS NOT INJURED.—Upon appeal by plaintiffs from a judgment which establishes their prior right, by appropriation only, to one hundred and eighty inches of water measured under a six-inch pressure, and establishes the subordinate rights of the defendant as an appropriator to one hundred inches of water, and as a riparian proprietor to the flow of the remainder of the stream, the appellants are not concerned in the question as to how the rights of the de-

WATER AND WATER RIGHTS (Continued).

fendant shall be measured, and as to whether there is a want of certainty on that question in the judgment and findings, and cannot be injured or entitled to a reversal of the judgment for want of such certainty. (*Smith v. Hawkins*, 119.)

WILLS.

1. **SUBSCRIPTION—EVIDENCE.**—The verdict of the jury, finding that the will in question was never subscribed by the alleged testator, held justified by the evidence. (*Estate of Silvano*, 226.)
2. **DATE OF DEVISES AND BEQUESTS—ALTERATION OF COMMON LAW BY CODE.**—Sections 1332 and 1333 of the Civil Code have the effect to abrogate the old common-law distinction by which devises spoke as of the date of the will, and bequests as of the date of the testator's death; and both devises and legacies in this state speak as of the latter date. (*Estate of Upham*, 90.)
3. **RESIDUARY DEVISE—DISPOSITION OF LAPSED DEVISE.**—Where there is a valid residuary devise, the property mentioned in a lapsed devise goes to the residuary devisee, and not to the heirs, unless a contrary intent is clearly expressed in the will. (*Id.*)
4. **RESIDUARY DEVISE TO CHARITABLE USE.**—A residuary devise to the legally constituted and qualified trustees or managers of a Good Templars' Orphans' Home, in a specified locality, "in trust for the use and benefit of the orphan children of said institution," is a valid devise of the residue of the estate to a charitable use. (*Id.*)
5. **LIBERAL CONSTRUCTION OF CHARITIES.**—Charities, both as to the trustees and the beneficiaries, are more liberally construed than are gifts to individuals. (*Id.*)
6. **DEVISE OF CHARITY TO UNINCORPORATED BODY—SUPERINTENDENCE OF COURT OF EQUITY—EFFECTUATION OF TRUST.**—The fact that the trustees of the designated orphans' home to whom the devise was made, were not themselves an incorporated body, though selected biennially under the auspices of an incorporated grand lodge of Good Templars, to manage and control the orphans' home, cannot affect the validity of the charity. A court of equity will not allow a charitable use to fail for want of a legal trustee; and, if the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of equity, and the court will appoint trustees, if necessary to effectuate the trust. (*Id.*)
7. **PROVISION FOR RATABLE APPORTIONMENT OF DEVISES—RESIDUARY DEVISE NOT REVOKED.**—A residuary devise, following special devises and bequests, is not revoked by a subsequent paragraph providing that the foregoing devises are to be increased or diminished ratably, with the exception of two devises specified, if the estate is

WILLS (Continued).

more or less than sufficient to pay the devises and bequests; and such provision does not prevent the falling into the residuary devise of lapsed devises or legacies, or invalid and void devises or legacies. (Id.)

8. **RESIDUARY DEVISE. HOW CONSTITUTED.**—No particular mode of expression is necessary to constitute a residuary devise. It is sufficient if the intention of the testator be plainly expressed in the will, that the surplus of the estate, after payment of debts and legacies, shall be taken by a person there designated. (Id.)

See Estates of Deceased Persons.

WRIT OF REVIEW. See Certiorari.







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127 Cal. 1-3. **PACIFIC PAV. CO. v. MOWBRAY.**

Assessment and Other Documents connected therewith are *prima facie* evidence of its regularity, p. 3.

Approved in *San Francisco Pav. Co. v. Bates*, 134 Cal. 40, bid for street work signed in name of corporation by secretary, which was accepted by board, is presumed to have been authorized by corporation.

127 Cal. 4-21. **JOHNSON v. GOODYEAR MINING CO.**

Act of March 29, 1897, regulating wages of employees of corporations, and establishing liens therefor, is special legislation, pp. 7-9.

Approved in *Beveridge v. Lewis*, 137 Cal. 631, Code of Civil Procedure, section 1248, allowing general benefits to land not taken, to be deducted in case of natural persons only, is void; *Williamson v. Liverpool etc. Ins. Co.*, 105 Fed. 33; Revised Statutes of Nevada of 1899, section 8012, providing for damages and attorney's fees in actions against insurance companies on policies, is void.

127 Cal. 40-45. **BRINGHAM v. KNOX.**

Complaint in Foreclosure of Lien Claim which alleges value by alleging contract price is sufficient in absence of demurrer for uncertainty, pp. 44, 45.

Approved in *Carpenter v. Furrey*, 128 Cal. 669, following rule; *Anderson v. Bank*, 140 Cal. 699, applying rule in action to set aside judgment and to enjoin its collection for fraud.

127 Cal. 49-51. **BIRCH v. PHELAN.**

Juror in Criminal Case in superior court of San Francisco is not entitled to pay out of municipal treasury, pp. 50, 51.

Approved in *Powell v. Phelan*, 138 Cal. 272, act of 1901, providing for payment of trial jurors who have served in San Francisco since act of 1895, is void as legislative gift; *Jackson v. Baehr*, 138 Cal. 267, Penal Code, section 1143, relating to jurors' fees, in criminal cases, construed.

127 Cal. 55-57. DAY v. DUNNING.

Ballots Cast for Excessive Number of Names for one office have effect only of not being counted for that office, p. 56.

Approved in *Patterson v. Hanley*, 136 Cal. 272, ballots upon which cross is placed after both "yes" and "no" in voting upon constitutional amendment, are not totally void.

127 Cal. 61-64. CARPENTER v. NUTTER.

Complaint in Action for Malicious Prosecution must allege termination of prosecution in favor of defendant, p. 63.

Approved in *Dowdell v. Carpy*, 129 Cal. 172, applying rule in action for malicious prosecution of civil action.

127 Cal. 65-67. PEOPLE v. VALLIERE.

It is Prejudicial Error to admit irrelevant evidence, though it is afterward stricken out, p. 66.

Approved in *State v. De Masters*, 15 S. Dak. 584, on prosecution for incest, admission in evidence of statements made in defendant's absence by woman, just after birth of child, as to its paternity, was reversible error, though jury subsequently instructed not to consider such evidence.

Where Answer to Question of Prosecution is ruled out, it is misconduct for district attorney, in argument to jury, to refer to matter of such answer, p. 66.

Approved in *People v. Derbert*, 138 Cal. 471, it is misconduct on part of district attorney to persist, against ruling of court, in asking improper questions; *People v. Sing Lee*, 145 Cal. 191, where defendant was convicted of receiving stolen goods, new trial properly granted because district attorney told jury that defendant was guilty of keeping a "fence" which only rested on excluded evidence.

127 Cal. 70-72. HIBERNIA SAV. ETC. SOC. v. FREESE.

Where Undertaking on Appeal is executed prior to second notice of appeal, and after first notice, its filing after second appeal does not constitute it an undertaking on such appeal, p. 71.

Distinguished in *Jarman v. Rea*, 129 Cal. 159, where undertaking on appeal is merely insufficient in form, new undertaking may be filed before hearing of motion to dismiss appeal.

126 Cal. 86-90. BERGEVIN v. CURTZ.

Elector defined, p. 88.

Approved in dissenting opinion in *Huston v. Anderson*, 145 Cal. 341, majority holding votes cast by persons assisted to vote by election offi-

cers are illegal unless it appear from register that each has declared under oath when registered that he cannot read or cannot mark ballot by reason of physical disability.

127 Cal. 91-98. ESTATE OF UPHAM.

Fact that Trustees of Designated Orphans' Home to whom devise was made were not incorporated cannot affect validity of devise, p. 94.

Approved in *Estate of Winchester*, 133 Cal. 275, 277, an unincorporated association, formed for a charitable object, composed of certain known members, and governed by constitution and by-laws, is capable of taking by bequest.

Equity Will not Allow a charitable use to fail for want of a legal trustee, p. 94.

Approved in *Estate of Gay*, 138 Cal. 554, 555, provision in will attempting to create permanent trust fund, the income of which is to be devoted to care of testator's burial plot, does not establish charitable use, and is void; *Fay v. Howe*, 136 Cal. 603, where testator created perpetual charitable fund, fact that he has provided only for exercise of the discretion of nephew as trustee does not show that the trust is personal to him.

Where Testator Gives All His Property remaining after payment of specific gifts, though fund be estimated in money, latter gift is not specific, but carries everything which has not been disposed of by lapses or void devises or legacies, p. 98.

Approved in *Estate of Granniss*, 142 Cal. 7, will making certain bequests and devising residue to daughter, passes to daughter all testator's estate not otherwise bequeathed; *O'Connor v. Murphy*, 147 Cal. 152, construing will containing residuary devise to wife and children named and providing that specified lot shall be kept and rented by executor for their benefit until youngest child attains certain age "or twelve years from the date of this will.

127 Cal. 99-101. PEOPLE v. TERRILL.

Presumptions are All in Favor of the innocence of the accused, p. 100.

Approved in *People v. Howard*, 143 Cal. 320, in prosecution for rape alleged to have been committed by sexual intercourse with female under sixteen, evidence of "intercourse" with prosecuting witness is not evidence that defendant had sexual intercourse with her.

If the Facts Stated may or may not constitute a crime, the presumption is that no crime is charged, p. 100.

Approved in *People v. Simpton*, 133 Cal. 369, indictment for perjury must allege in plain and direct language that defendant was first duly sworn to "testify, depose or certify truly."

127 Cal. 101-103. EX PARTE KNAPP.

County Ordinance Forbidding Shipment of game from county in which it has been lawfully killed, is void, p. 102.

Approved in *In re Marshall*, 102 Fed. 326, holding void county ordinance making it misdemeanor to use magazine gun for killing game; see 78 Am. St. Rep. 249, note. Distinguished in *Ex parte Kennke*, 136 Cal. 529, upholding Penal Code, section 626k, making it misdemeanor to buy or sell quail.

Ordinance Intended to Discriminate in favor of sportsmen and against all others in respect to disposition of game lawfully killed is not proper exercise of police power, pp. 102, 103.

Approved in dissenting opinion in *Ex parte Kennke*, 136 Cal. 532, majority upholding Penal Code, section 626k, making it misdemeanor to buy or sell quail.

127 Cal. 107-113. CALIFORNIA SAV. ETC. SOC. v. CULVER.

Provision for Foreclosure by Mortgagee at his election upon default of interest may be waived by him, p. 112.

Approved in *More v. Russell*, 133 Cal. 300, 301, 85 Am. St. Rep. 170, where note contained provision for its becoming due, at option of holder upon default in interest, presentation of claim against estate of maker on default in interest does not compel him to sue before maturity.

127 Cal. 128-134. ESTATE OF MARRE.

Administrator not Charged with Interest on money in his hands unless he has profited thereby or been guilty of misfeasance, p. 132.

Approved in *Elizalde v. Elizalde*, 137 Cal. 638, where fund left in trust by will for care of incompetent, and executors acknowledged reception of fund, interest cannot be charged after trustee's death against his administrator.

127 Cal. 137-142. DENIGAN v. HIBERNIA SAV. ETC. SOC.

Where Wife's Separate Money is deposited in savings bank, and book shows alternative account, no gift to husband shown where wife retained book, p. 140.

Approved in *Denigan v. San Francisco Sav. Union*, 127 Cal. 145, 146, following rule. See 78 Am. St. Rep. 42, note.

Burden is on Donee of Deposit claiming under husband without consideration to show affirmatively that it had ceased to be wife's separate property, p. 141.

Approved in *Fræse v. Hibernia Sav. etc. Soc.*, 139 Cal. 396, following rule.

127 Cal. 142-152. **DENIGAN v. SAN FRANCISCO SAV. UNION.** 78 Am. St. Rep. 35.

Where Wife Deposits Money in Savings Bank, and takes out bank-book in alternate names, burden is on husband's donee to show that it had vested in husband, p. 147.

Approved in *Freeze v. Hibernia Sav. etc. Soc.*, 139 Cal. 395, 396, following rule.

127 Cal. 155-162. **STEVENS v. TREEMAN.**

Order of Court for Payment of Claim for services as reporter need not designate fund out of which it is to be paid, p. 158.

Approved in *Higgins v. San Diego*, 131 Cal. 304, city cannot defeat claim primarily payable out of an exhausted fund by refusal to transfer surplus from another fund thereto.

Code of Civil Procedure, section 274, as amended in 1880, is valid, p. 159.

Approved in *Pratt v. Browne*, 135 Cal. 651, holding void county government act (Stats. 1897, p. 546), fixing salary of official court reporter.

Amendment of 1885 to Code of Civil Procedure, section 274, authorizing court to order payment of monthly salary of reporter, is void, p. 159.

Approved in *Pratt v. Browne*, 135 Cal. 652, holding void county government act (Stats. 1897, p. 546), fixing compensation of official court reporter; *Meacham v. Bear Valley Irr. Co.*, 145 Cal. 608, superior court cannot in ejectment without trial, order judgment for plaintiff for recovery of law for failure of defendant to deposit one half of reporter's per diem as required by rules.

127 Cal. 162-166. **CONNICK v. HILL.**

Foreclosure Sale of Separate Parcels en masse not invalid where no bids received when offered separately, p. 164.

Approved in *Summerville v. March*, 142 Cal. 558, following rule; *Anglo-Californian Bank v. Cerf*, 142 Cal. 305, upholding foreclosure sale of distinct parcels en masse when sheriff first offered property for sale by each description, and received no separate bid for either parcel.

Party Seeking to Set Aside Sale has burden of showing such irregularity or material departure as will justify court in setting it aside, p. 165.

Approved in *Anglo-Californian Bank v. Cerf*, 142 Cal. 307, upholding foreclosure sale en masse when no separate bid received.

Affidavit to Set Aside Foreclosure Sale for selling parcels en masse which had been offered separately without bid must show that parcels were known lots or parcels, p. 165.

Approved in *Meux v. Trezevant*, 132 Cal. 489, refusing to set aside foreclosure sale en masse for refusal to sell in parcels on demand of mortgagor, where property sold for full value.

127 Cal. 177-184. **KEECH v. BEATTY.**

Opinion of Judge Rendering Judgment is not admissible to control effect of judgment as respects res adjudicata, where record shows parties and cause of action are the same, p. 183.

Approved in *Belger v. Sanchez*, 137 Cal. 618, applying rule in ejectment.

Possession at Commencement of Action is necessary to maintenance of ejectment, p. 183.

Approved in *Richards v. Morey*, 133 Cal. 440, action to recover possession of personalty will not lie if at commencement of action defendant has not possession or power to deliver it in satisfaction of the judgment.

127 Cal. 184-189. **ESTATE OF HEDRICK.**

Public administrator's semi-annual statements required by C. C. P. § 1736, are not settlements of accounts required by 1622, p. 188.

Approved in *Los Angeles Co. v. Kellogg*, *arguendo*.

127 Cal. 202-206. **FAST v. STEELE.**

Court May Order probate mortgage, p. 203.

Approved in *Murphy v. Farmers' etc. Bank*, 131 Cal. 120, where court permitted mortgage to be executed to pay estate's debts, and it was executed in part for private debt of executrix, title of mortgagee under foreclosure is not void.

127 Cal. 212-217. **PEOPLE v. WILLIAMS.**

Where it is Apparent from Question that answer will contain inadmissible evidence, motion to strike out must be preceded by objection to question, p. 216.

Approved in *People v. Scalamiero*, 143 Cal. 345, applying rule in prosecution for assault to rape; *People v. Lawrence*, 143 Cal. 156, applying rule in prosecution for conspiracy to rob.

127 Cal. 217-226. **SACRAMENTO CO. v. SOUTHERN PAC. CO.**

County Paying for Bridge to be Used for Highway which has been completed and used is estopped to sue for money paid if contract though legally defective was not immoral or unjust, pp. 221-223.

Approved in *Contra Costa W. Co. v. Breed*, 139 Cal. 440, 446, 449, where council having general authority to provide for furnishing city

with water, received and retained benefit of water supply, though there was no previous contract as to price, city is estopped to deny validity of claim on ground that it had not passed lawful ordinance therefor.

127 Cal. 232-243. HANLEY v. CALIFORNIA BRIDGE ETC. CO.

Motion for Nonsuit Admits Truth of all plaintiff's evidence, and every inference of fact that can be drawn therefrom, p. 237.

Approved in Estate of Arnold, 147 Cal. 586, applying rule in contest of probate of will; Allen v. Florence etc. Ry., 15 Colo. App. 214 following rule.

Servant may Presume that master furnishes reasonably safe place to work, pp. 240, 241.

Approved in Swenson v. Bender, 114 Fed. 7, following rule.

Inexperienced Servant is not Chargeable as matter of law with negligence where danger to him was not so obvious that a reasonably prudent person would have avoided it, p. 242.

Approved in Tedford v. Los Angeles Elec. Co., 134 Cal. 80, electric company liable for injury by live wire to inexperienced servant who was assigned to do work of lineman, without instruction or warning as to danger,

127 Cal. 243-244. PEOPLE v. ESLABE.

Provision of Penal Code, section 869, requiring transcript of reporter's notes to be filed with clerk within ten days, is directory only, p. 244.

Approved in People v. Buckley, 143 Cal. 381, following rule.

127 Cal. 258-260. GOODALL v. JACK.

Running of Statute of Limitations in favor of stockholders on statutory liability not interrupted by renewal of debt under which liability created, p. 260.

Approved in Jones v. Goldtree Bros. Co., 142 Cal. 385, corporation cannot, without consent of stockholders, extend time for commencement of action against them, by any subsequent renewal or extension of time for payment of its original debt.

127 Cal. 261-274. PORTER v. LASSEN ETC. CO.

Vote of Majority of Full Board of Directors is valid as corporate act, though vacancy exists, pp. 267, 268.

Approved in Schnittger v. Old Home etc. Min. Co., 144 Cal. 607, fact that money secured by corporation was loaned by two directors who took note and mortgage, securing it in the name of third person, and failed to disclose interest, and were present and participated in direc-

tors' meeting at which loan voted on, does not vitiate transaction where majority of disinterested directors authorized transaction.

127 Cal. 275-278. **ESTATE OF HUELSMAN.**

Land specifically devised may be set apart as homestead, p. 276.

Approved in *Estate of Firth*, 145 Cal. 239, following rule.

Probate court cannot order executors to discharge mortgage on probate homestead, p. 277.

Distinguished in *Estate of Shivley*, 145 Cal. 403, where court ordered mortgage on decedent's realty proceeds of which were used to pay debts, and subsequently set apart part of mortgaged premises as homestead administrator could apply proceeds of sale of residue of mortgaged premises toward payment of homestead.

127 Cal. 283-290. **JOHNSON v. CALIFORNIA LUSTRAL CO.**

Act of April 23, 1880, requiring two-thirds vote of stockholders for disposition of mining ground, applies to any ground acquired by corporation to mining purposes, pp. 285-288.

Approved in *Williams v. Gaylord*, 186 U. S. 164, affirming 102 Fed. 374, and *Lacy v. Gunn*, 144 Cal. 515, all upholding section 1 of act of April 23, 1880, requiring ratification of two-thirds of stockholders of mining corporation to insure validity of sale of mining ground.

127 Cal. 290-312. **RUGGLES v. CANNEDY.**

Assignee in Insolvency representing creditors who have proved their claims may maintain action to have chattel mortgage adjudged null and void as to them, p. 305.

Approved in *First Nat. Bank v. Ludvigsen*, 8 Wyo. 246, 249, administrator of insolvent estate may, in replevin against him, defend his possession against chattel mortgage by showing invalidity of mortgage against creditors, though claims of creditors have not been presented. Distinguished in *Summerville v. Kelliher*, 144 Cal. 157, chattel mortgage given by lessee upon his interest in crop is not rendered void by delay of fifteen days in recording it after execution thereof as against subsequent sale of leasehold interest under execution, after record of mortgage.

Inclusion of Assignee in Insolvency in Civil Code, section 3440, and his omission, section 2957, does not affect his general power to represent the estate and to sue for benefit of creditors in cases arising under section 2957, p. 305.

Approved in *First Nat. Bank v. Menke*, 128 Cal. 108. Civil Code, section 3439, does not apply where voluntary assignment is made for benefit of creditors.

127 Cal. 326-327. **CHILDSTROM v. EPPINGER.** 78 Am. St. Rep. 46.

Assignment of Judgment without assignment of undertaking on appeal therefrom passes no right of action on undertaking, p. 327.

Distinguished in *Heisen v. Smith*, 138 Cal. 219, assignment by ward of judgment rendered against guardian upon settlement of accounts operates as equitable assignment of ward's cause of action against sureties on bond.

127 Cal. 327-331. **MILLER v. CARLISLE.**

In Action to Foreclose Several Mechanics' Liens where demand of each claimant is less than three hundred dollars, if liens are invalid, superior court cannot render personal judgment against land owners, pp. 329, 330.

Approved in *Miller v. Carlisle*, 127 Cal. 332, following rule. Distinguished in *Weldon v. Superior Court*, 138 Cal. 429, superior court has jurisdiction in equity both of proceeding to foreclosure mechanic's lien, and also of proceeding to reach funds due contractor in hands of owner of building in which there must be an adjustment of all equities.

127 Cal. 336-339. **McGEE v. HAYES.**

Incompetent cannot Consent to jurisdiction or waive any steps necessary to confer jurisdiction upon court, p. 338.

Approved in *Guardianship of Sullivan*, 143 Cal. 466, 468, neither attorney nor alleged incompetent can waive right to have judge who presided at hearing pass upon merits of petition for letters of guardianship.

127 Cal. 339-341. **PEOPLE v. MOONEY.**

Under Penal Code, Section 447, defining arson, specific intent to destroy building must be distinctly averred in addition to averments of wilful and malicious burning, p. 340.

Approved in *People v. Mooney*, 132 Cal. 15, reciting history of litigation. Distinguished in *People v. Seeley*, 139 Cal. 120, where information charges a libel per se that defendant has been guilty of theft and has been dishonest in his business, it need not allege that libelous matter tended to impeach honesty, integrity or reputation of person libeled.

127 Cal. 347-351. **PEOPLE v. SHAVER.**

Where There is no Vacancy in Office an appointment by governor is invalid and confers no right, p. 351.

Approved in *Adams v. Doyle*, 139 Cal. 680, pendency of contest proceedings in behalf of candidate who did not receive certificate of election against holder thereof cannot affect title of appointee of board to salary during his incumbency.

127 Cal. 351-355. COSTA v. SILVA.

Where Transfer of Realty is Made to one person and consideration thereof is paid by another, a trust is presumed to result in favor of person by whom payment is made, pp. 354, 355.

Distinguished in *Fleischer v. Fleischer*, 11 N. Dak. 229, construing agreement between wife and son to contest husband's timber culture entry.

127 Cal. 355-362. CHURCHILL v. FLOURNOY.

Order Granting New Trial will be affirmed if it can be justified on any ground permitted by statute which is included in motion regardless of ground on which court below may have based its order, pp. 361, 362.

Approved in *Simon Newman Co. v. Lassing*, 141 Cal. 175, applying rule in unlawful detainer.

When Trial is had before One Judge and motion for new trial is passed upon by another judge latter has same powers and duties as if motion has come before former, p. 361.

Approved in *Hausmann v. Sutter St. Ry. Co.*, 139 Cal. 175, discretion of succeeding judge in granting new trial in case tried by predecessor not disturbed on appeal in absence of abuse; *Blood v. La Serena L. & W. Co.*, 134 Cal. 365, fact that judge who by stipulation decided cause and made findings was not one before whom witnesses appeared at trial cannot affect presumption, on appeal, in favor of trial court's decision.

127 Cal. 365-372. WILLIAMS v. RIEHL. 78 Am. St. Rep. 60.

Part of Sureties on Guardian's Bond who have paid in full a judgment rendered against the guardian and all of the sureties to the extent of the liability may enforce contribution from others, p. 369.

Approved in *Treat v. Craig*, 135 Cal. 93, payment of deficiency judgment by grantees of mortgagor to prevent a sale of property under execution is not a voluntary payment which precludes recovery thereof from mortgagor.

127 Cal. 372-376. PEOPLE v. HAWKINS.

Defendant by Going to Trial without objection that sixty day limit provided for by Penal Code, section 1382 has expired waives right to demand dismissal, p. 374.

Approved in *People v. Fitzgerald*, 137 Cal. 551, where premises are viewed by jury and after return it was agreed that objects of motion had been accomplished to satisfaction of both sides, it cannot be objected for first time on appeal that there was irregularity in mode of pointing out objects by officer in charge of jury.

127 Cal. 376-382. PEOPLE v. OLIVERA.

Jury are judge as to whether confession was voluntary, p. 381.

Approved in *People v. Thomson*, 145 Cal. 725, applying rule to testimony of witness as to dying declarations of person killed.

127 Cal. 382-388. CADENASSO v. ANTONELLE.

Bond for Construction of Mining Tunnel, containing agreement to pay for labor or materials furnished for contractors, does bind sureties to pay third parties moneys advanced to contractors, p. 386.

Approved in *Boas v. Maloney*, 138 Cal. 108, where contractor's bond makes no mention of liens and building was completed according to contract and full price paid and sureties cannot be held liable for amount of liens thereafter filed for labor, notwithstanding liens were valid claims against building.

127 Cal. 388-400. PATTON v. BOARD OF HEALTH OF SAN FRANCISCO.

Health inspector required to be appointed by city health board, and whose duties are fixed by board, is an officer, pp. 396-399.

Cited in *Wall v. Board of Directors*, 145 Cal. 471, 472, where deaf and dumb asylum directors elect physician he cannot be removed before expiration of term.

127 Cal. 400-408. PEOPLE v. UNION B. & L. ASSN.

Where Facts Warranting Appointment of Receiver are not shown by pleadings or findings, order of appointment will be reversed on judgment-roll, p. 404.

Approved in *Bories v. Union Bldg. etc. Assn.*, 141 Cal. 75, 81, reciting history of litigation.

127 Cal. 412-417. PEOPLE v. FUHRIG.

Dying Declarations are not Admissible if declarant had slightest hope of recovery and it is plainly manifest that they were not made under belief of impending death, p. 414.

Distinguished in *People v. Dobbins*, 138 Cal. 697, dying statement as to facts connected with shooting is admissible where declarant said he was satisfied that all hope of surviving was gone; *People v. Amaya*, 134 Cal. 535, dying declaration admitted where made under solemn belief of impending death.

127 Cal. 417-422. SOUTHERN CAL. RY. v. SUPERIOR CT. DIST.

Writ of Review is not allowed for the purpose of annulling appealable orders, p. 419.

Approved in *State v. District Court*, 24 Mont. 499, following rule; *Elledge v. Superior Court*, 131 Cal. 280, special order made after judgment reducing amount of judgment by striking out costs therefrom, being appealable cannot be reviewed on certiorari.

All Special Orders made after final judgment are appealable irrespective amount involved, p. 420.

Approved in *Sierra Union etc. Co. v. Wolff*, 144 Cal. 432, in action to quiet title court has jurisdiction of appeal from order striking out cost-bill in sum less than three hundred dollars.

127 Cal. 423-427. **PEOPLE v. MCINTYRE.**

Discrepancy Between Shorthand Notes and transcript, principally in matter of punctuation is a harmless variance, pp. 425, 426.

Approved in *People v. Goodrich*, 142 Cal. 221, following rule.

Under Penal Code, Section 869, magistrate may appoint reporter who is competent to do the work though he have not qualifications prescribed for superior court reporters prescribed by Code of Civil Procedure, title IV, chapter III, p. 426.

Approved in *People v. Munley*, 142 Cal. 443, 444, it is no objection to validity of preliminary examination that stenographer was not an official reporter where magistrate stated he knew him to be competent, nor that he was not sworn by the magistrate.

Instance of Sufficiency of Showing of absence of witness from state to admit in evidence testimony given at preliminary examination, p. 427.

Approved in *People v. Barker*, 144 Cal. 707, absence of witness from state is sufficiently established by proof of declarations that he was to leave state to engage in business in Seattle and reception of letters from him at Seattle.

127 Cal. 431-438. **BLYTHE v. HINCKLEY.**

Treaty Regulating Alien's Rights to possess, enjoy and inherit property prevails over state legislation, p. 435.

Approved in *Byrne v. Drain*, 127 Cal. 667, amendment of 1896 to section 6, article XI, of constitution relieved from control of act of March 6, 1889, provisions of Los Angeles charter relating to opening and widening of streets.

127 Cal. 438-442. **GRUNDEL v. UNION IRON WORKS.**

Joint tortfeasors may be sued individually or collectively, p. 441.

Approved in *Heath v. Manson*, 147 Cal. 701, where owners of lots were sued jointly with members of board of public works and their sureties, dismissal of action as to owners, does not affect liability of others.

127 Cal. 450-453. ESTATE OF McDERMOTT.

Administrator's Surety is not party aggrieved by order disallowing accounts and cannot appeal therefrom merely by reason of suretyship, p. 452.

Approved in *Elliott v. Superior Ct.*, 144 Cal. 506, strangers make themselves parties to record by motion to set aside judgment complained of, and may review order denying motion by certiorari if it is not appealable. Distinguished in *Estate of Heaton*, 139 Cal. 238, in appeal from order settling accounts of special administrator and directing him to pay balance in his hands to another special administrator, appellant is party aggrieved if order is erroneous.

127 Cal. 456-459. ESTATE OF HEYDENFELDT.

Petition for Sale of Realty showing substantial compliance with Code of Civil Procedure, section 1537 is sufficient to sustain order of sale and in absence of special demurrer cannot be assailed on appeal for uncertainty, p. 458.

Approved in *Estate of Levy*, 141 Cal. 643, where petition for order of sale refers to schedule for values and condition of realty, and values there set forth are the appraised values thereof, this, in absence of special objection, is sufficient statement of present values; *Estate of Cook*, 137 Cal. 189, petition of sale of realty of decedent merely alleging that land is unimproved desert land and chiefly valuable for the possibility that it may contain petroleum without either stating its value or that its value could not be ascertained, is substantially defective as against direct attack on appeal from order of sale.

127 Cal. 460-463. MORE v. MORE.

Appeal from Order removing an administrator does not revive or restore his powers, p. 463.

Approved in *Guardianship of Van Loan*, 142 Cal. 432, applying rule in case of guardianship proceedings.

127 Cal. 471-479. OTTO v. LONG.

Personal Action on Note allowed where mortgage is on property in which mortgagor has no interest, pp. 475, 476.

Approved in *Brophy v. Downey*, 26 Mont. 259, where note was secured by second mortgage which is valueless by reason of foreclosure of first mortgage, holder of such note need not foreclose during period of redemption.

Release and Acknowledgment of Satisfaction and discharge of claim upon note against solvent estate of decedent, and extension of time to devisees is sufficient consideration for execution of new and valid mortgage by devisees, p. 478.

Approved in *Humboldt Sav. & L. Soc. v. Dowd*, 137 Cal. 411, where note and mortgage executed by husband and wife were proved as claim as against husband's estate and application of heirs for renewal of note was granted, and new note and mortgage executed, implied agreement not to foreclose mortgage before expiration of renewal was sufficient consideration for new note and mortgage.

127 Cal. 491-495. **GIRVIN v. SIMON.**

Objection to council remonstrating against acceptance of contract described therein on "claim" that "said contract has not been done according to specifications on file in the office of the street superintendent, is good appeal, p. 494.

Approved in *Creed v. McCombs*, 146 Cal. 453, protest filed with clerk against acceptance of work for reason that work has not been done according to specifications and terms of contract, is an appeal.

127 Cal. 496-506. **ESTATE OF KASSON.**

In Proceeding to Determine Heirship each person who sets up claim has separate and independent right to conduct his case according to his own judgment, p. 505.

Approved in *Estate of Kasson*, 141 Cal. 40, where appellant who claimed entire estate as against other parties to proceeding failed to appear at trial after refusal of her motion for continuance, and offered no evidence, nonsuit properly granted as to her claim.

Miscellaneous.—*Lindy v. McChesney*, 141 Cal. 353, and *Estate of Kasson*, 141 Cal. 35, both reciting history of litigation.

127 Cal. 506-510. **DRANGA v. ROWE.**

In Action to Quiet Title, city cannot set up claim for taxes assessed and levied more than three years prior to suit, and demand payment as condition of plaintiff's recovery, p. 508.

Approved in *Clark v. San Diego*, 144 Cal. 361, in action to quiet title against city, defense of lien for delinquent taxes cannot be sustained where right of action for collection of taxes is lost under statute of limitations.

Assessment and Levy of Taxes must be made strictly as provided by law, p. 508.

Approved in *Miller v. Kern Co.*, 137 Cal. 522, affidavit to the corrected assessment-roll required to be made by the clerk of the board of equalization, and the affidavit of auditor required to be made before roll delivered to tax collector, are essential to validity of assessment book.

127 Cal. 515-519. **FOX v. SUTTON.**

Code of Civil Procedure, section 386, as amended in 1881, permits in-

terpleader against conflicting claimants to personalty without depositing property in court at commencement of action, p. 518.

Approved in *Woodmen etc. v. Rutledge*, 133 Cal. 643, where plaintiff paid money into court and conflicting claimants interpleaded between themselves, plaintiff has no further interest in case and is not party to appeal from judgment between claimants.

127 Cal. 520-524. FERRIS v. BAKER.

On motion for nonsuit plaintiff is entitled to benefit of facts in testimony and of presumptions of fact which might reasonably be drawn from them, p. 522.

Approved in *Estate of Arnold*, 147 Cal. 586, applying rule in contest of probate of will.

127 Cal. 528-532. RODGERS v. BYERS.

After Original Obligation is barred, action must be on new acknowledgment or promise, p. 530.

Approved in *Concannon v. Smith*, 134 Cal. 17, complaint setting forth note and mortgage and alleging that in action to foreclose mortgage it was decreed that they were barred by statute, and that subsequent to bar defendant in writing acknowledged debt and promised to pay same, is not upon note but upon new promise, and is good as against general demurrer.

Where Conditional Promise is relied upon, it must be pleaded as made, and breach of condition must be averred and proved, p. 530.

Approved in *Morehouse v. Morehouse*, 140 Cal. 92, 93, following rule.

127 Cal. 532-538. BENSON v. BUNTING. 78 Am. St. Rep. 81.

Amendment of 1897 to Code of Civil Procedure, section 702, shortening time for redemption does not apply to mortgages executed prior to its passage, p. 534.

Approved in *Tuohy v. Moore*, 133 Cal. 518, though certificate of sale to plaintiff incorrectly named one year as time for redemption where it appears that mortgage was made prior to amendment to Code of Civil Procedure, section 702, fixing limit of one year.

Where Plaintiff in Foreclosure of Mortgage executed prior to 1897, employed defendant's attorneys to bid at sale, and through them misrepresented to defendant that he had twelve months to redeem, he is estopped to insist upon statutory period, pp. 535, 536.

Approved in *Wallace v. Dodd*, 136 Cal. 211, mortgagee who acquired title to mortgaged premises by sheriff's deed under foreclosure, after assuring mortgagor that he claimed no interest in nursery stock placed by mortgagor on mortgaged land, and that he would not claim trees

when he got sheriff's deed, is estopped to deny mortgagor's title and right of possession of nursery stock.

Miscellaneous.—*Benson v. Bunting*, 141 Cal. 463, reciting history of litigation.

127 Cal. 542-543. PEOPLE v. QUINN.

Names of Witnesses examined by grand jury are indorsed on indictment to inform both sides of names of witnesses upon whose testimony indictment is based, and to give opportunity to secure their attendance at trial, pp. 542, 543.

Approved in *People v. Breen*, 130 Cal. 75, indictment not set aside where name of "Mrs. E. Osborn" indorsed thereon and "Mrs. Susie Osborn" was witness, identity of witness appearing and name indorsed bore initial of husband.

127 Cal. 545-550. PEOPLE v. COLE.

Commitment by magistrate cures imperfections in complaint, p. 549.

People v. Warner, 147 Cal. 548, following rule.

Information not Set Aside on ground that district attorney who filed complaint had no personal knowledge of facts of the homicide, p. 549.

Approved in *People v. Lee Look*, 143 Cal. 219, when information accords with commitment insufficiency of original complaint to justify warrant of arrest is immaterial.

District Attorney cannot read portions of statements made to him by witness for defense, having no relation to direct testimony, and then cross-examine witness thereon, pp. 549, 550.

Distinguished in *People v. Bishop*, 134 Cal. 687, hesitation and difference in testimony of witness may be shown by comparison of his testimony at former trial.

127 Cal. 560-562. HAWLEY v. GRAY BROS. ETC. CO.

On Appeal from Judgment properly entered against sureties, it is presumed that former premature judgment reversed on appeal was reversed at request of appellants, p. 562.

Approved in *Galvin v. Palmer*, 134 Cal. 428, 429, where judgment was set aside on ground that it was entered by clerk without direction therefor and court subsequently ordered entry of second judgment, latter is final judgment in case, and on collateral attack where record is silent presumption that plaintiff had notice of vacation of first judgment is conclusive.

127 Cal. 563-565. DUKES v. KELLOGG.

Amendment of complaint is properly refused when after three ineffectual attempts to amend, further proposed amendment, is not tendered by plaintiff to court for inspection, p. 565.

Approved in Kleinclaus v. Dutard, 147 Cal. 252, upholding refusal to amend after demurrer to complaint sustained where record does not show nature of proposed amendment.

127 Cal. 570-574. PEOPLE v. KING.

Whether Act of March 31, 1897, relating to lunacy commission is a revision of entire law upon subject of insane asylums and a repeal of all former laws upon subject, p. 571.

Approved in Napa State Hospital v. Flaherty, 134 Cal. 317, treasurer of Napa State Hospital cannot maintain action in name of hospital to compel payment by father for support of his insane adult son at former insane asylum.

127 Cal. 575-578. HIBERNIA SAV. ETC. CO. v. THORNTON.

Instrument upon which action or defense is founded may be made part of pleading by reference, p. 577.

Approved in Georges v. Kessler, 131 Cal. 184, in action to foreclose mechanic's lien, copy of notice of lien attached to complaint as exhibit becomes part of complaint.

127 Cal. 582-588. ESTATE OF CARPENTER.

Bill of Exceptions to rulings of judge if not presented at time of ruling, must be presented and settled upon notice pursuant to statute and then filed, p. 584.

Approved in Estate of Scott, 128 Cal. 580, ex parte bill of exceptions to ruling of court upon passing on administrator's account, which was not settled until day after rulings made without service of draft there-of on opposing party, who was not present at settlement and did not agree to same, cannot be considered on appeal.

127 Cal. 588-595. ETCHAS v. ORENA.

No Other Cause of Action can be alleged or proved than that stated in the claim presented and passed upon by the executor, p. 594.

Approved in Gallagher v. McGraw, 132 Cal. 602, presentation of amount of principal and interest of note as claim against estate of deceased maker does not change nature of demand, with reference to jurisdiction of action on note for amount of claim. Distinguished in Thomson v. Orena, 134 Cal. 29, description of land not essential for certainty of claim against estate for services which were to be paid for out of sale of certain lands.

127 Cal. 598-605. **LIMBERG v. GLENWOOD L. CO. S. C.**, 145 Cal. 256.

Servant Assumes Risk of working with defective appliances if he continues to use them with knowledge of dangerous condition without protest, or continues to use them for unreasonable time after notification to master of their condition, pp. 600, 601.

Approved in *Dolan v. Sierra Ry. Co.*, 135 Cal. 439, where employee was in fact ignorant of defective construction of trestle, he did not assume risk thereof by traveling over it; *Murdock v. Oakland etc. Elec. Ry.*, 128 Cal. 27, applying rule when conductor was injured by defective electric car negligently used by railway company.

In action for negligence of master in furnishing defective appliances, evidence that defects remedied after accident is inadmissible, p. 604.

Approved in *Helling v. Schindler*, 145 Cal. 313, evidence that knives of planer were sharpened after accident is inadmissible.

127 Cal. 608-611. **JOHNSON v. OAKLAND ETC. ELEC. RY.**

Question of Negligence and proximate cause of injury are for the jury to determine from the evidence, p. 609.

Approved in *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 604, upholding verdict for plaintiff injured in street-car collision where car was crossing sidewalk at car-house at rate of three miles per hour, and no warning given and no look-out kept; *Siemens v. Oakland etc. Ry.*, 134 Cal. 496, *arguendo*.

Regular Passengers may testify that train was going very fast and at unusual speed at time of accident, p. 611.

Approved in *Schneider v. Market St. Ry. Co.*, 134 Cal. 486, where there was evidence from which jury might infer that street-car was crossing tracks at excessive speed when it collided with deceased, and when it appears no bell sounded at crossing as required by city ordinance, company's negligence is sufficiently established to support verdict.

127 Cal. 612-621. **STOCKTON SAV. ETC. SOC. v. HARROLD.**

In Foreclosure of Mortgage, subsequent mortgagee made party defendant, may by cross-complaint foreclose mortgage held by him against maker and third party upon a larger tract and also one upon a distinct tract, pp. 616-618.

Approved in *Murphy v. Superior Court*, 138 Cal. 72, an action for partition of distinct parcels in different counties, between tenants in common who derive their title from same source may be brought in any court in which any portion of land is situated; *Newhall v. Bank of Livermore*, 136 Cal. 537, in foreclosure of mortgage upon undivided half interest, prior mortgagee made defendant who holds mortgage upon entire premises may upon cross-complaint foreclose such mortgage upon whole property and bring in other parties.

Defendant in Foreclosure who holds second mortgage on additional land may cross-complain and bring in new parties, p. 618.

Approved in *United States Mtg. Co. v. Marquam*, 41 Or. 404, following rule.

127 Cal. 638-641. **UNION PAC. ETC. CO. v. McGOVERN.**

Protest of Majority of Frontage Owners upon proposed street improvement delivered to clerk suspends power of board to proceed for six months, and precludes further ordering of work without new resolution, p. 639.

Approved in *Pacific Pav. Co. v. Sullivan Estate Co.*, 137 Cal. 262, following rule.

Agreement of Property Owners to get contract for work in front of their lots at reduced rate and to assign same to one who would do work at that rate does not estop them from disputing validity of assessment, pp. 639, 640.

Distinguished in *Cummings v. Kearney*, 141 Cal. 160, where plaintiff's predecessor in title requested improvement, and requested street superintendent to deliver the assessment and diagram upon faith of which work was done, and acquiesced in all proceedings, without objection, his acts and conduct cannot be questioned as against bond owner.

127 Cal. 648-656. **FLINN v. FERRY.**

Where Chattel Mortgage gives right of possession upon default in payment of note or interest, mortgagee or his assignee could replevin property upon such default, p. 652.

Approved in *Harper v. Gordon*, 128 Cal. 491, following rule.

Defect in Complaint alleging that plaintiff was in possession of property and entitled thereto on the day before commencement of action and that defendant took possession and refused to return it on demand, is cured by answer alleging defendant to be owner and entitled to possession, p. 654.

Approved in *Carroll v. Briggs*, 138 Cal. 454, objection that complaint in failing to allege written contract should have alleged consideration cannot be first raised on appeal where answer alleged contract and defendant permitted contract to be proved.

127 Cal. 656-659. **HENEHAN v. HART.**

Time for Payment of Note past due cannot be extended for definite period so as to bind payee by unexpected oral agreement that maker shall pay interest monthly, for such period, pp. 657, 658.

Approved in *Harloe v. Lambie*, 132 Cal. 136, evidence of parol agreement to change time for payment of rent from that stated in lease is inadmissible; *Muller v. Swanton*, 140 Cal. 252, arguendo.

127 Cal. 659-663. HEALY v. SUPERIOR COURT.

Public administrator obtains letters, not as individual but by virtue of his office, p. 662.

Approved in *Los Angeles County v. Kellogg*, 146 Cal. 593, 596, where under statute public administrator is salaried officer and must pay all fees into treasury, where he continues to administer upon estates after expiration of term, he cannot retain fees; *Earl v. Bowen*, 146 Cal. 762, construing provisions of Los Angeles charter relating to letting of contracts.

127 Cal. 663-668. BYRNE v. DRAIN.

Amendment of 1896, to article XI, section 6 of constitution, removed paramount control of general laws in respect to municipal affairs and restored operation of municipal charters in respect to such affairs, p. 667.

Approved in *Ex parte Helm*, 143 Cal. 556, 557, municipal corporation organized under special charter prior to adoption of constitution, may if authorized by charter, impose license tax for revenue.

Provisions of Los Angeles Charter relating to opening of streets which were suspended by general law of March 6, 1889, were relieved from its control by constitutional amendment of 1896, to article XI, section 6, p. 667.

Distinguished in *German Sav. etc. Soc. v. Ramish*, 138 Cal. 131, street bond act was not repealed by amendment of 1896 to constitution, article XI, section 6, and such amendment does not give life to scheme for street improvements in Los Angeles charter, which were void under constitution, article XI, section 8; *Banaz v. Smith*, 133 Cal. 104, provisions of Los Angeles charter of 1889, so far as their conflicting with Vrooman act were thereby annulled and were not reinstated by constitutional amendment of 1896 to article XI, section 6.

127 Cal. 669-675. WELLS-FARGO CO. v. ENRIGHT.

An Agreement not to plead statute of limitations is not against public policy, p. 673.

Approved in *State Loan etc. Co. v. Cochran*, 130 Cal. 252, following rule.

127 Cal. 676-680. PEOPLE v. DE GRAAFF.

Where title to property does not pass on transfer of possession, offense is larceny and not obtaining money under false pretenses, p. 679.

Approved in *People v. Delbos*, 146 Cal. 737, where money given to one to pay for lodging house purchased by prosecuting witness in respect

to which defendant had made false statement as to price with intention to appropriate difference, offense is larceny.

127 Cal. 681-686. KRAUSE v. DURBROW.

Act of 1880, Section 3, for further protection of stockholders in mining corporations, is special legislation, pp. 684, 685.

Distinguished in *Lacy v. Gunn*, 144 Cal. 514, upholding act of April 23, 1880, section 1, requiring ratification of two-thirds of stockholders of mining corporation to insure validity of disposition of mining ground.

127 Cal. 686-688. LONG v. SUPERIOR COURT.

Where Interpleader Involving Disputed Right to fund which plaintiff deposited in court was dismissed as to him and defendants litigated claim, and on appeal interpleader was approved, execution for costs of appeal cannot issue against plaintiff, p. 687.

Approved in *San Francisco Sav. Union v. Long*, 137 Cal. 71, in interpleader where no issue is joined as to plaintiff's right to sue and he is dismissed and defendants litigate between themselves costs of appeal awarded to appellant cannot be awarded against plaintiff.

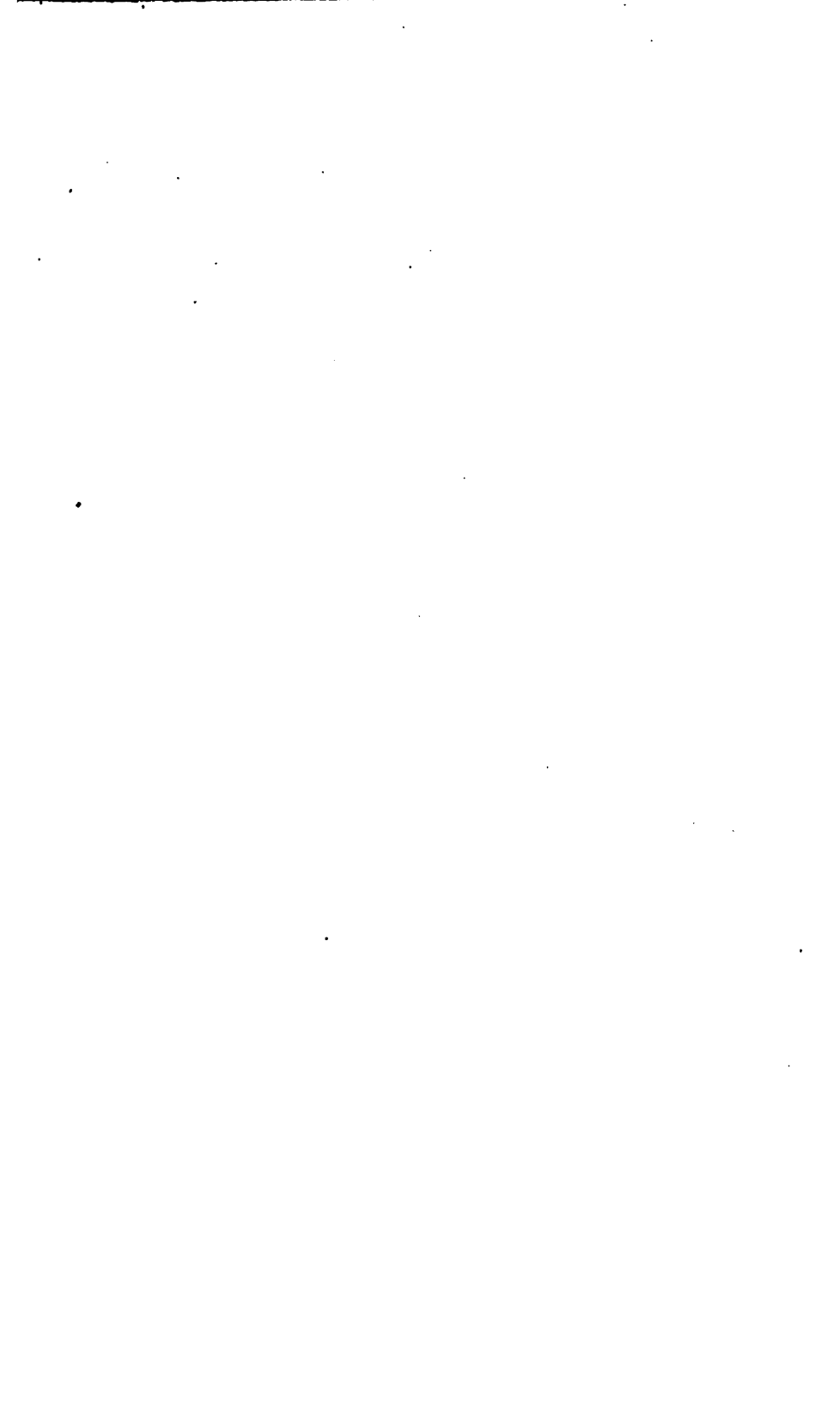
127 Cal. 688-692. HODGKINS v. WRIGHT.

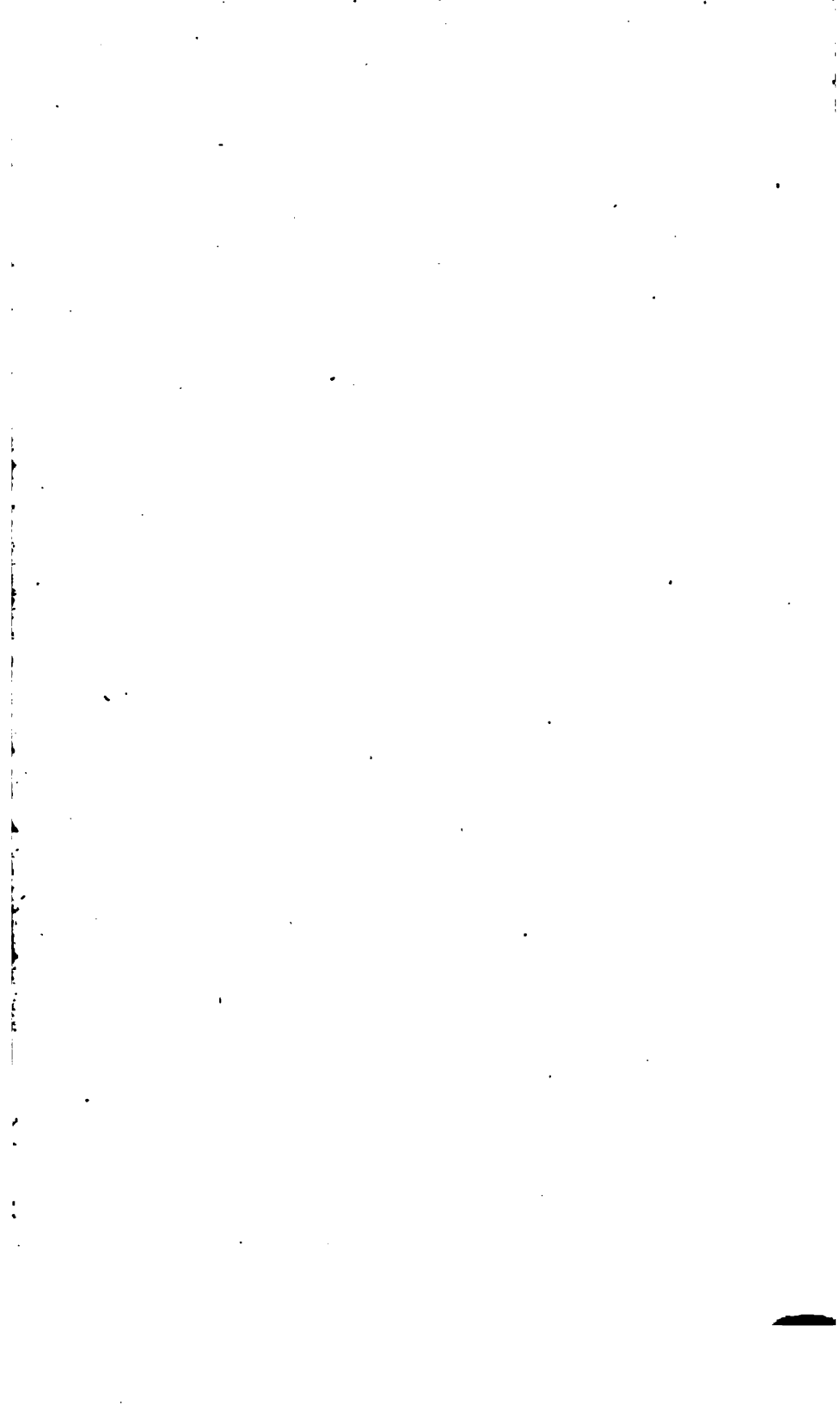
Trust deeds to secure debts are valid, p. 692.

Cited in *Tyler v. Currier*, 147 Cal. 35, *arguendo*.













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